

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT
AND JOINT APPENDIX**

FILED OCT 11 1943
IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8597 **136**

THE BOARD OF DIRECTORS OF CITY TRUSTS OF
THE CITY OF PHILADELPHIA, A CORPORA-
TION, *Appellant*

VS.

CLIFTON MALONEY, as Executor under the last will
of Annie W. Chieves, Deceased, et al., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

Appeal No. 8597

THE BOARD OF DIRECTORS OF CITY TRUSTS OF
THE CITY OF PHILADELPHIA, *Appellant*,

vs.

CLIFTON MALONEY, as Executor under the last will of
Annie W. Chieves, Deceased,
HUBERT A. SPANGLER, individually and as Executor
and Trustee under the will of Mary E. Graff, Deceased,
THE RECTOR, CHURCH WARDENS AND VESTRY-
MEN OF ST. MATTHEW'S CHURCH, FRANCIS-
VILLE, a corporation,
THE GRENFELL ASSOCIATION OF AMERICA, a
corporation,
THE WASHINGTON HOME FOR INCURABLES, a cor-
poration,
AMERICAN SECURITY AND TRUST COMPANY, a
body corporate, executor under the will of Inez Walsh
Fulton, also known as Inez W. Fulton, Deceased,
Appellees.

BRIEF OF APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal by the Board of Directors of City Trusts of the City of Philadelphia from a judgment entered in the District Court of the United States for the District of

Columbia on the 4th day of May, 1943, in a proceeding brought for construction of the will of the late Inez Walsh Fulton, also known as Inez W. Fulton. Appellate jurisdiction is vested in this Court by Act of March 3, 1891, C. 517, Sec. 6 (26 St. 828), and amendments; U. S. C. Title 28, Sec. 225, and Title 11, Sec. 201 of the 1940 Code of Laws for the District of Columbia and the Acts of Congress cited therein.

Jurisdiction in the District Court of the United States for the District of Columbia was based upon Title II, Secs. 301, 305, 306, 317, 318 and 325 of the 1940 Code of Laws for the District of Columbia and Acts of Congress as therein cited.

STATEMENT OF CASE.

The action was instituted by the American Security and Trust Company, Executor named in the will of Inez Walsh Fulton. The original defendants were Annie W. Chieves, a sister of Inez Walsh Fulton for whom, on her death, her Executor, Clifton Maloney, was substituted as a defendant; Hubert Spangler, individually and as the Executor and Trustee under the will of Mary E. Graff, who likewise was a sister of Inez Walsh Fulton; the Rector, Church Wardens and Vestrymen of St. Matthew's Church, Francisville, named in the will as St. Matthew's P. E. Church, Francisville; the Grenfell Association of America, named in the will as Grenfell Mission; the Washington Home for Incurables, named in the will as Home for Incurables; and the Board of Directors of City Trusts of the City of Philadelphia, named in the will as City Trust of Philadelphia. The sole appellant is the Board of Directors of City Trusts of the City of Philadelphia.

The only question presented, so far as the appellant was concerned, was whether the will conveyed the net estate of the testatrix to her sisters absolutely or granted them life estates with remainder over to the appellant. The District Court held that the will gave the sisters an absolute estate in fee.

THE FACTS.

Inez Walsh Fulton died a resident of the District of Columbia on June 12, 1939 (App. 4) leaving a last will and testament dated July 3, 1933 (App. 9, Ex. A) and a codicil thereto dated May 11, 1936 (App. 11, Ex. B), both of which are holographic.

Her will provided: "To my sisters Mary E. Graff . . . and Annie W. Chives . . . I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts," naming three charities, to wit: St. Matthew's Church, the Grenfell Mission, and the Washington Home for Incurables, and the amounts of \$500, \$250 and \$100, respectively. (App. 9, 10) After providing for the cremation of her body, the burial of the ashes, the erection of a headstone and a simple service, and appointing her sister Mary E. Graff as Executrix without bond and her sister Annie W. Chives as substitute Executrix without bond, the testatrix proceeded:

"After the death of Mary E. Graff and Annie W. Chives the estate is to be placed in the City Trust of Philadelphia, Pa., which has charge of the funds of Girard College;—to purchase a scholarship in the medical school Jefferson College for a Protestant graduate of Girard College at graduation . . ."

and in detail described the type of scholarship which she desired to have established (App. 10, 11). This portion of the will, which is by far the largest part of the will, concluded with the words: "The scholarship is to be called 'The Inez Walsh Fulton Scholarship'." (App. 11) The only change made by the codical was to revoke the appointment of Mary E. Graff as Executrix and in her place to appoint as Executor the American Security and Trust Company (App. 10, 11).

At the time of her death Inez Walsh Fulton was 72 years of age (App. 4). Her only surviving relatives were the two sisters named in the will. Mary E. Graff, one of the sisters,

who died on July 14, 1939, a little more than a month after the death of Inez Walsh Fulton, was at the time of her death 81 years of age (App. 5). She left a will dated June 26, 1939, which was admitted to probate by the Probate Court of the City of Philadelphia (App. 12, 17) and letters testamentary were issued thereunder to the appellee Hubert A. Spangler (App. 5, 17). Her estate, which was valued at approximately \$48,000, was left principally to friends. She left nothing to Girard College (App. 12, Ex. D).

The other sister, Annie W. Chieves, died in May 1941, at the age of 81 (App. 15). Her will was admitted to probate in the District Court of the United States for the District of Columbia and letters testamentary were issued to Clifton Maloney, appellee herein (App. 15). She left her entire estate, which was valued at approximately \$50,000, to numerous charitable organizations and institutions. She left nothing to Girard College.

STATEMENT OF POINT ON WHICH APPELLANT RELIES.

The trial court erred in holding that the Testatrix bequeathed to her two sisters absolute estates and that the trust provisions of her will were precatory.

SUMMARY OF ARGUMENT.

The will of Inez Walsh Fulton bequeathed to her two sisters life estates with power to consume the principal during their lives and granted the remainder, consisting of the principal undisposed of at the deaths of the sisters, to the appellant in trust to establish the Inez Walsh Fulton Scholarship at Jefferson College.

ARGUMENT.

The Will of Inez Walsh Fulton Bequeathed to Her Two Sisters Life Estates with Power to Consume the Principal During Their Lives and Granted the Remainder, Consisting of the Principal Undisposed of at the Deaths of the Sisters, to the Appellant in Trust to Establish the Inez Walsh Fulton Scholarship at Jefferson College.

The Court below, in its oral opinion delivered at the conclusion of the argument of counsel, construed the portions of the will of the testatrix by which she established a trust for the benefit of Jefferson College students as nothing more or less than a request by the testatrix to her sisters to place the undisposed portion of the property which she left them in trust for the benefit of Jefferson College. (App. 32) Apparently the Court was itself conscious of the strain thus put on the language the testatrix used, for the opinion states:

“That is a construction of the will which you may say is a little stretched, but that would account for everything that is in the will.” (App. 32)

By this holding the Court placed on a parity the detailed provisions spelled out by the testatrix for the conduct and management of the trust she established and the purely precatory provisions for the three charities to which she asked her sisters to make small payments, even though the language used in the creation of the trust is dispositive and directory in character.

The effect of the lower Court's decision is to limit the testamentary character of the will to its first paragraph and to give no testamentary effect whatsoever to the major portion of the will in which the testatrix, with great care, set forth in precise terms the type and character of the scholarship trust which she evidently intended to be a lasting memorial to herself.

It has long since been well settled that the intent of a testator is to be drawn from the four corners of the will and that this means that all portions of the will are of equal validity and are to be enforced unless it is impossible to give force to all of them.

Young v. Munsey Trust Co., 111 F. (2d) 514;
Walker v. Thomas, 64 App. D. C. 148, 75 F. (2d) 667;
Evans v. Ockershausen, 69 App. D. C. 285, 290, 100 F. (2d) 695;
Washington Loan & Tr. Co. v. Hammond, 278 Fed. (D. C. App.) 569;
Presbrey v. Simpson, 290 Fed. 333 (D. C. App.)

There are only two possible constructions of the will of the testatrix. Either she gave her entire estate to her sisters absolutely or she left her estate to them for life with remainder over of the undisposed portion in trust to establish the Inez Walsh Fulton Scholarship at Jefferson College. To adopt the first alternative is to reject the bulk of the will as not being testamentary in character. Only by adopting the second alternative can meaning be given to the whole of the will.

This is not the first occasion when a question of this type has arisen. Both the courts of the District of Columbia and those of the states throughout the Union have from time to time been called upon to find the intent of testators who made apparently contradictory dispositions of their property. In these cases the courts have frequently mentioned that, while certain rules of construction have been developed, it is dangerous to reason from the fact situation in one case to that in another case unless the fact situations are identical. This is particularly true of holographic wills drawn by persons who are not lawyers and who do not appreciate the technical legal meanings of the words which they may use.

Atkins v. Best, 27 App. D. C. 148;
Abbott v. Essex Co., 18 How, 202, 15 L. Ed. 352;

McCaffrey v. Monogue, 196 U. S. 563, 49 L. Ed. 600,
25 Sup. Ct. Rep. 319.

An examination of the cases has disclosed agreement among the authorities for the proposition that where a testator first bequeaths certain property to a particular person in language which, standing alone, would amount to an absolute grant, such a bequest is to be construed as a life estate if later in the will the same property or what remains of it is granted to another upon the death of the devisee or legatee first named. The rule of construction herein involved has been stated as follows:

“As a rule, an absolute devise in terms must be construed in connection with other clauses of the will which seem to modify its effect, and a fee which is given in the first part of a will may prove to be so restrained by subsequent words as to reduce it to a life estate.”
Schouler on Wills, Sec. 559.

In *Seaward v. Davis*, 198 N. Y. 415, the will of William Z. King read as follows:

“I give and bequeath all my personal property of every name and kind, to my wife, excepting my piano, which I give to LILLY CORWIN aforesaid. Whatever personal estate may remain at the decease of my wife, I give and bequeath to BRIEL DAVIS and ABIGAIL DAVIS, the parents of my wife, or if they are not living, then to my sisters aforesaid, and LILLY CORWIN, share and share alike.”

Chief Judge Cullen, writing the opinion, said (pp. 419-420):

“On the merits, we are of the opinion that the will of William Z. King was properly construed by the Appellate Division on the first appeal in this case. (*Tuthill v. Davis*, 121 App. Div. 290) That is to say, its effect was to give the widow a life estate with the absolute power of disposition during her lifetime, with remainder over of such parts as she might not dispose of to the persons named in the will.”

In *Matter of Ithaca Trust Co.*, 220 N. Y. 437, the court was called upon to construe the meaning of a codicil. In his will the testator gave the bulk of his property to his wife and his mother in equal shares. In the codicil he provided:

"I hereby will and direct that the one-half ($\frac{1}{2}$) of my estate which in said will I gave to my mother Harriet Simpson, shall be hers absolutely to use up, spend or give away, in any way she sees fit, but I will and direct, in the event there is any of the property hereby willed to her left and undisposed of by her at the time of her death, that sum or amount of property thus willed to her shall belong to my said wife, Mary A. Simpson, providing she shall be living at that time, and, as thus modified I hereby confirm my said will in all respect." (p. 439)

Judge Chase relied on Judge Marshall's opinion in *Smith v. Bell* 31 U. S. 68 discussed *infra*, in holding that the codicil limited the mother's estate to a life estate with power to consume, saying at page 442:

"The Testator's intention to restrict the gift to his mother to a life estate with power of disposition in her life is not contrary to law. . . . It is apparent that the testator intended to provide quite unreservedly for his mother in her lifetime, and it is also apparent that subject to the provision for his mother during her lifetime, the testator desired to add to the provision for his wife any remainder of the gift to his mother that she did not actually use up, spend, give away or dispose of prior to her death."

To the same effect is *Callahan v. Volke*, 220 App. Div. 379, 222 N. Y. Supp. 48.

A similar situation is presented in *In re Brennan's Estate*, 188 Atl. 160, 324 Pa. 410. In that case the testator, after making various specific bequests, proceeded:

"Ninth: All the rest, residue and remainder of my estate I give, devise and bequeath to my wife, Alice

Brennan, with the right to sell and dispose of any of my real estate, with authority to make any and all deeds, conveyances and assurances, and execute the same, according to law, and holding the purchaser thereof free from any liability as to the application of the purchase money.

Tenth: After the death of my wife, I give the remainder of my estate in equal shares to my sister-in-law, Bridget Sweeney, to my brothers, Richard Brennan and William P. Brennan, and my niece, Mary Ellen Griffen, to them and their heirs and assigns forever." (p. 161):

In its opinion the court said (p. 162):

"Turning to the will before us, we are of opinion that it falls within the second group of cases described in *Byrne's Estate*, supra, as it appears that testator intended to give his wife a life interest only in his estate, with power to consume the principal while she lived, and upon her death the remainder or unconsumed residue of his estate was then to be paid over in equal shares to the designated beneficiaries.

* * * * *

The construction urged by the appellant would render inoperative the entire tenth paragraph of the will. As was pointed out in *Byrne's Estate*, supra, 320 Pa. 513, at page 519, 181 A. 500, this is counter to the established rule that a construction is to be sought which will, if possible, render every word of a will operative, rather than have some words become idle and nugatory. 'It is a well-understood rule of construction that effect must be given, if possible to every part of the will and to all the words used by testatrix.' [Citations]

It is apparent from the will that testator desired to make full provision for his wife during her lifetime and intended to give her the right to use such portion of the principal of his estate as might be necessary for her comfort and maintenance. Under such circumstances, a power to consume the principal is primarily a matter of the testator's intention, and although not expressly given, will be implied where necessary to carry out that intention. [Citations]."

The lower court apparently found some magic in the testatrix's use of the word "unconditionally". (App. 31) It is obvious that the use of that word added nothing to the estate granted to the sisters. The will of the testatrix would have precisely the same meaning whether she said "to my sisters. . . . I bequeath all that I own and possess" or "to my sisters . . . I bequeath, unconditionally, all that I own and possess." In short the estate of the sisters is not enlarged in any way by the use of the word "unconditionally". What Mrs. Fulton likely intended was nothing more than that during their lives the sisters would have the free and unrestricted use not only of the income but also of the principal with power to consume the same without incurring liability for waste.

Any doubt as to the character of the estate granted by Mrs. Fulton to her sisters or that her use of the word "unconditionally" had any other meaning than that suggested should be removed by the decisions in *Smith v. Bell*, 31 U. S. 68, perhaps the leading case on the subject, and in *In re Byrne's Estate*, 181 Atl. 500, 320 Pa. 513, which, of all the cases in the books, are closest on their facts to the instant case. The cases are really identical.

The will of Britain B. Goodwin, which was construed in *Smith v. Bell*, 31 U. S. 68, provided:

"I give to my wife ELIZABETH GOODWIN, all my personal estate . . . , which personal estate, I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal, absolutely; the remainder of said estate, after her decease to be for the use of the said Jesse Goodwin."

In construing the effect of the testator's words, Chief Justice Marshall stated, at pages 75-76:

"If the first bequest is to take effect, according to the obvious import of the words, taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same, as if the last member of the sentence were stricken out, yet both clauses are

equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled, than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first, so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life."

And again at page 83:

"In the case before the court, it is, we think, impossible to mistake the intent. The testator unquestionably intended to make a present provision for his wife, and a future provision for his son. This intention can be defeated only by expunging, or rendering totally inoperative, the last clause of the will. In doing so we must disregard a long series of opinions, making the intention of the testator the polar star to guide us in the construction of wills, because we find words which indicate an intention to permit the first taker to use part of the estate bequeathed."

The language construed in *In re Byrne's Estate*, 181 Atl. 500, 320 Pa. 513, was:

"Sixth: All the rest, residue and remainder of my estate, whether real, personal or mixed, wheresoever situate, I give, devise and bequeath unto my beloved sister, R. Philomena Byrne, absolutely.

"Seventh: Upon the death of my said sister, R. Philomena Byrne, should any part of my estate remain, I give, devise and bequeath the same to my beloved niece, Mrs. J. M. Shadle."

In holding that the sister received only a life estate with power to consume the principal, the court, in the course of an opinion which contains an exhaustive review of the relevant cases, said, at pages 501-3):

“The cases of this character in our reports fall into two groups. On the one hand we have repeatedly observed that ‘an estate devised in fee cannot be subsequent limitations be stripped of its legal incidents’ (In re Fairman’s Estate, 287 Pa. 334, 336, 135 A. 262, 263), and we have accordingly held that ‘Where words sufficient to vest an absolute interest are used in a will, such interest is not to be cut down by subsequent provisions, unless the testator has indicated a clear intent to take away the estate previously given.’ Cross v. Miller, 290 Pa. 213, 216, 138 A. 822, 823. . . . On the other hand, ‘we have probably as often held that, in finding the controlling intention, all the words used by testator should be taken into account, and, if the intent to restrict the gift is clear, it must be given effect.’

* * * * *

“The repugnancy which causes a gift over of an unconsumed portion to fail in the first group of cases lies in the restriction imposed by the gift over upon the alienation of a previously given estate of absolute ownership. . . . But before this doctrine may be invoked, it must appear clearly, from a reading of the whole will, that testator’s intention was to vest in the first taker an estate of absolute ownership. The use of words of restriction after language which in itself would be sufficient to create an absolute estate may of course be evidence—to be considered with other provisions in the will—of an intent to create a less estate. Accordingly, a gift over after the death of the first taker may indicate an intention to vest in the first taker no more than a life estate, and where an examination of the whole will discloses such to be the controlling intention it will of course be given effect.”

In discussing the effect of the word “absolutely” the court said, at pages 503-4:

“It is urged by appellees that this construction wholly disregards the word ‘absolutely’ and hence runs counter to the rule favoring a construction which will render every word operative rather than one which makes some words idle and nugatory. But appellees’ construction would render inoperative not one word

but a whole paragraph. Nor can it be said that the word 'absolutely' is being disregarded. The plain import of this word in the sixth paragraph is that, being about to provide for a gift over upon her sister's death, testatrix wanted to make it quite clear that her sister was to have an absolute and unrestricted power of enjoyment and disposition while she lived. There can be no doubt that Mrs. Byrne was entitled to use and consume or dispose of her sister's residuary property during her life for any purpose and in any way that she might see fit, and without interference or challenge from anyone. But it is equally clear that any of the property not thus expended was to go over to testatrix' niece."

It will be noted that the provisions for the wife in *Smith v. Bell* and for the sister in *In re Byrne's Estate* were made "absolutely", just as the provision by Mrs. Fulton for her sisters was made "unconditionally". Obviously "unconditionally" is no stronger in its legal effect than "absolutely". In fact, "absolutely" has the more definite legal meaning and is more frequently used to identify a bequest or devise in fee. In neither case was the use of unrestricted language nor the addition thereto of the word "absolutely" deemed sufficient to grant a fee as against the further provision of the will that upon the death of the first named beneficiary the undisposed of portion of the estate should go in fee to another. Rather it was taken to mean that the former should be unrestricted during life in the use of the property granted with remainder over of the unconsumed portion to the latter.

Mrs. Fulton knew that her sisters were well advanced in years, one of them being 81 and the other 79 at the time she died. She likely knew also that they were not poor, yet she was conscious of the possibility that extended illnesses with the expenses attendant thereupon might make great demands on their property. Nothing could be more natural than for the testatrix to have every desire to put all of her property, principal and interest, at the disposal of her

sisters during their lives. At the same time nothing could be more natural than for the testatrix at the same time to desire that whatever of her property remained at the death of her two sisters should be used to establish, as a memorial to herself, a worthwhile scholarship for the benefit of the students of the college where she had been a teacher. The trust provisions contained in the will are eloquent testimony of her humanitarian impulses and at the same time of her desire to be remembered after her death as one who had helped to give to society, in this age of specialists, general practitioners of the art of medicine.

As events fell out the deaths of her sisters followed close upon her own. They left ample estates which they disposed of by will. They needed none and used none of the decedent's property. Any concern the testatrix might have felt for their financial well-being in their declining years died with them.

If, to paraphrase *Smith v Bell, supra*, the testatrix could now be asked "Where do you want your property to go, your sisters having died", she would, undoubtedly, answer, "I made that very clear in my will. I want my property to be placed in trust for the education at Jefferson College of deserving graduates of Girard College and I want that trust to be known as the Inez Walsh Fulton Scholarship."

In the light of the authorities above cited and the rule they enunciate that a seemingly absolute grant can be limited to a life estate by a subsequent clause showing an intent to create a remainder over, the only proper construction of the instant will is to hold that the testatrix granted to her sisters a life estate with power to consume with remainder for the benefit of Jefferson College.

CONCLUSION.

BY HER WILL THE TESTATRIX INEZ WALSH FULTON GRANTED TO HER SISTERS AN ESTATE FOR LIFE WITH POWER TO CONSUME THE PRINCIPAL DURING THEIR LIVES AND GRANTED THE REMAINDER, CONSISTING OF THE PRINCIPAL UNDISPOSED OF AT THE DEATHS OF THE SISTERS, TO THE APPELLANT IN TRUST TO ESTABLISH THE INEZ WALSH FULTON SCHOLARSHIP AT JEFFERSON COLLEGE.

Respectfully submitted,

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APPENDIX

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IN THE

United States Court of Appeals

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No. 8597.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF
THE CITY OF PHILADELPHIA, A CORPORA-
TION, *Appellant*

vs.

CLIFTON MALONEY, as Executor under the last will
of Annie W. Chieves, Deceased, et al., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

JOINT APPENDIX.

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS DESIGNATED.**

1 Endorsed: Filed Dec 10 1940 Charles E. Stewart,
Clerk

In the District Court of the United States for the
District of Columbia

Civil Action File No. —

Complaint 9383

AMERICAN SECURITY AND TRUST COMPANY, a body corporate,
executor under the will of Inez Walsh Fulton, also
known as Inez W. Fulton, deceased, Fifteenth Street
and Pennsylvania Avenue, N. W., Washington, D. C.,
Plaintiff,

v.

- (1) ANNIE W. CHIEVES, 1657 Thirty-first Street, N. W.,
Washington, D. C.,
CLIFTON MALONEY, Ex.
- (2) HUBERT A. SPANGLER, individually and as executor and
trustee under the will of Mary E. Graff, deceased,
c/o Powell Knitting Co., Twenty-eight and Parrish
Streets, Philadelphia, Pennsylvania,
- (3) THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF ST.
MATTHEW'S CHURCH, FRANCISVILLE, a corporation,
Francisville, Philadelphia, Pennsylvania,
- (4) THE GRENFELL ASSOCIATION OF AMERICA, a corporation,
156 Fifth Avenue, New York, New York,
- (5) THE WASHINGTON HOME FOR INCURABLES, a corporation,
Wisconsin Avenue and Upton Street, N. W., Wash-
ton, D. C.,
- (6) THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY OF
PHILADELPHIA, a corporation,
Lafayette Building, Fifth and Chestnut Streets,
Philadelphia, Pennsylvania, *Defendants.*

Complaint for Construction of Will

The complaint of the American Security and Trust Company, a corporation, as executor under the will of
 2 Inez Walsh Fulton, also known as Inez W. Fulton, deceased, respectfully shows to the Court:

1. That plaintiff is a body corporate organized under the laws in force in the District of Columbia and having its principal office and place of business at the City of Washington, in said District, and files this complaint as the duly qualified and acting executor under the will of Inez Walsh Fulton, also known as Inez W. Fulton, late of the City of Washington, District of Columbia, letters testamentary upon the estate of said decedent having been issued to plaintiff in administration cause No. 55,289 of the Probate Branch of this Court by order entered therein on July 21, 1939; and that this Court has jurisdiction over the subject matter of this proceeding by reason of its general power to construe wills.

2. That the defendant Annie W. Chieves is an adult citizen of the United States and a resident of the District of Columbia, and is sued in her own right as a beneficiary under the will of the above-named Inez Walsh Fulton, and also in respect of her interest under the will of Mary E. Graff, deceased; the defendant Hubert A. Spangler is an adult citizen of the United States, residing in the City of Philadelphia, State of Pennsylvania, and is sued as the duly qualified and acting executor and as trustee under the will of said Mary E. Graff, a deceased beneficiary under the will of Inez Walsh Fulton, and also individually in respect of his interest under the will of said Mary E. Graff; the defendant The Rector, Church Wardens and Vestrymen of St. Matthew's Church, Francisville, named in the will of Inez
 3 Walsh Fulton as "St. Matthews P. E. Church, Francisville," is a corporation organized for religious purposes and located at Francisville, Philadelphia, Pennsylvania, and is sued in respect of its interest under

the will of said Inez Walsh Fulton; the defendant The Grenfell Association of America, a corporation, with headquarters at No. 156 Fifth Avenue, New York, New York, is sued in respect of its interest under the will of Inez Walsh Fulton, wherein it is named as "Grenfell Mission, Labrador"; the defendant The Washington Home for Incurables, a corporation, with headquarters at Wisconsin Avenue and Upton Street, N. W., Washington, D. C., is sued in respect of its interest under the will of Inez Walsh Fulton; and the defendant The Board of Directors of City Trusts of the City of Philadelphia, a corporation having charge of all property dedicated to the City of Philadelphia for charitable purposes, and having headquarters in the Lafayette Building, Fifth and Chestnut Streets, Philadelphia, Pennsylvania, named in the will of Inez Walsh Fulton as "City Trust of Philadelphia, Pa." is sued in respect of its interest as a named beneficiary, as trustee, under the will of Inez Walsh Fulton and as representing all possible beneficiaries of such trust.

3. That Inez Walsh Fulton, also known as Inez W. Fulton, late a citizen of the United States and a resident of the District of Columbia, departed this life June 12, 1939, leaving a last will and testament dated July 3, 1933, and a codicil thereto dated May 11, 1936, which were heretofore admitted to probate and record as the will of both real and personal estate of said decedent by an order entered on July 21, 1939, in administration cause No. 55,289 of the Probate Branch of this Court; that true copies of said will and codicil

4 are attached hereto marked "Exhibit A" and "Exhibit B", respectively, and are prayed to be read and considered as a part hereof; that by said order of July 21, 1939, letters testamentary were issued to this plaintiff, who, thereupon, undertook its duties as executor; that thereafter plaintiff filed in said administration cause its first executor's account showing the collection of all assets known to be due the estate of said decedent, except certain assets hereinafter described, and showing the payment of

all known debts of said decedent and all claims against her estate, excepting only this plaintiff's commission as executor, and further showing the retention for subsequent distribution in accordance with this Court's determination of the true meaning and intent of the decedent as expressed by her said will and codicil, of the following:

Bonds, appraised at	\$ 2,964.80
Stocks, appraised at	10,010.75
Notes, excluding those determined to be worthless, face value	5,667.50
Cash	7,827.75
Total	\$26,470.80

all as more fully shown in the copy of said account as approved by the Court under date of September 27, 1940, which is attached hereto marked "Exhibit C" and is prayed to be read and considered as a part hereof; that since the filing of its said first executor's account, plaintiff has collected certain further sums due the estate of said decedent aggregating in amount Two Hundred Sixty-seven Dollars and Thirty-nine Cents (\$267.39) and plaintiff believes it may reasonably expect to receive approximately Seven Hundred Dollars (\$700.00) as a final distribution from the estate of George J. Graff, deceased; and that, according to plaintiff's information and belief, said Inez Walsh Fulton died seized of no real estate or of any interest therein,
5 either in the District of Columbia or elsewhere.

4. That Mary E. Graff, a sister and beneficiary under the will of Inez Walsh Fulton, survived said Inez Walsh Fulton, but died on, to wit, July 14, 1939, leaving a last will and testament dated June 26, 1939, which has heretofore been admitted to probate and record by the Probate Court of the City of Philadelphia, State of Pennsylvania, and upon which letters testamentary were issued by said Court to the defendant herein Hubert A. Spangler; that a true copy of said last will and testament is annexed hereto

marked "Exhibit D" and is prayed to be read and considered as a part hereof; the plaintiff is informed that the assets of the estate of said Mary E. Graff, exclusive of any interest in the estate of Inez Walsh Fulton, are ample to pay all debts, claims, taxes and legacies and still leave a residue which, according to the will of said Mary E. Graff, passes to the defendant Hubert A. Spangler, as trustee, for the uses and purposes fully set out in said will.

5. That the last will and testament of said Inez Walsh Fulton provided in part as follows:

"To my sisters, Mary E. Graff 4913 Monument Road, North Wynnefield, Philadelphia, Pa, and Annie W. Chieves, 1657-31st Street, Washington, D. C., I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts.

St. Matthews P. E. Church, Francis-	
ville, Philadelphia, Pa. (five hundred)	\$500.00
Grenfell Mission, Labrador (two hun-	
dred & fifty)	250.00
Home for Incurables, Washington, D. C.	
(one hundred)	100.00

* * * * *

"After the death of Mary E. Graff, and Annie W. Chieves, the estate is to be placed in the City Trust of Philadelphia, Pa. which has charge of the funds of Girard College;—to purchase a scholarship in the Medical School, Jefferson College, for a Protestant graduate of Girard College, at graduation, who has an excellent record during his entire period of residence in Girard College, for character and scholarship.

"The training in Jefferson College is to be in general medicine—as I feel there is needed good practitioners, not specialists.

"No course in Jefferson College must be granted for longer than four years.

"If the lad does not do good work, and have excellent reports, he must be dropped, and the advantage given to another Girard College graduate.

"During the Jefferson College *sessions, the student may be allowed \$30 a month, should the City Trust find that amount available;—less if not.

"* This means that during vacation no \$30 is to be allowed.

"Should the estate in the future, allow enough for an additional student, the Board of City Trust is authorized to extend the benefaction at their discretion.

"The scholarship is to be called 'The Inez Walsh Fulton Scholarship'."

6. That plaintiff is advised that under the provisions of the will of Inez Walsh Fulton quoted in the preceding paragraph hereof, a doubt exists as to whom, under the proper construction and interpretation of her will, the net assets of her estate should be paid and as to the nature and extent of the interest of the recipient or recipients thereof, that is: (a) whether plaintiff should pay or has any duty whatever in respect of the payment to the defendants The Rector, Church Wardens and Vestrymen of St. Matthew's Church, Francisville, The Grenfell Association of America, and The Washington Home for Incurables, of the sums set opposite their respective names where they appear in the will of said Inez Walsh Fulton; and (b) whether the gift to Mary E. Graff and the defendant Annie W.

Chieves was one of an absolute estate in the net distributable assets of the estate of Inez Walsh Fulton, or of a life estate only, and, if the latter, to whom and in what proportions and amounts should plaintiff pay and deliver such net distributable assets.

7. That plaintiff has communicated to the parties hereto the doubts concerning the true meaning and intention of the decedent, Inez Walsh Fulton, as expressed by her will and as set out in the preceding paragraph hereof, but said parties failed to agree among themselves as to such proper intent and meaning and, therefore, so plaintiff is advised

by its counsel, plaintiff is entitled, for its protection and for assistance in stating its final executor's account, to submit to the Court for its determination the question herein raised, namely, the disposition to be made of the net distributable estate of Inez Walsh Fulton, deceased.

8. That the parties hereto constitute all parties necessary to be joined in a proceeding respecting the subject matter of this complaint.

Wherefore, the Premises Considered, plaintiff prays:

1. That process of this Court may issue directed to the defendants herein and each of them, requiring them to appear herein by a day certain and answer the exigencies of the foregoing complaint, and that a suitable order of publication may be entered as to such of the defendants as cannot be served personally or who do not appear
8 herein voluntarily.

2. That this Court may, by its decree, determine the questions hereinbefore set out and instruct plaintiff in regard thereto.

3. That the Court may enter such preliminary orders and decrees as may be necessary in the prosecution of this proceeding.

4. That if the Court deem it appropriate, this cause may be referred to the Auditor of this Court to state the final account of plaintiff as executor in the light of the construction by this Court of the will of said Inez Walsh Fulton, to recommend to the Court allowances to be made to plaintiff for its compensation as executor and for its counsel fees and costs incurred in this proceeding and in the administration of said decedent's estate, and to report his conclusions to the Court.

5. That this plaintiff may have such other and further relief as to the Court may seem meet in the premises.

AMERICAN SECURITY AND
TRUST COMPANY, executor
as aforesaid

By HOWARD MORAN
Vice-President.

Attest:

FREDERICK P. H. SIDDONS

Secretary

PEELLE, LESH, DRAIN & BARNARD and A. G. NICHOLS, JR.

By A. G. NICHOLS, JR.,
1422 F Street, N. W.,
Attorneys for plaintiff.

DISTRICT OF COLUMBIA, ss:

Howard Moran, being first duly sworn, on oath,
9 deposes and says that he is the Vice-President of the
American Security and Trust Company, the corporate plaintiff herein, and that he is duly authorized to verify the foregoing and annexed complaint by him subscribed as such Vice-President; that he has read said complaint and knows the contents thereof and verily believes the same to be true.

HOWARD MORAN

Subscribed and sworn to before me this 2d day of December, 1940.

J. ELIOT MORAN

Notary Public, D. C.

(Seal)

10 Endorsed: Filed Dec 10 1940 Charles E. Stewart,
Clerk

Copy
Exhibit A

July 3, 1933.

Inez Walsh Fulton

I, Inez Walsh Fulton, being of sound mind, do declare this to be my last will and testament.

To my sisters, Mary E. Graff 4913 Monument Road, North Wynnefield, Philadelphia, Pa, and Annie W. Chieves, 1657-31st Street, Washington, D. C., I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts.

Inez Walsh Fulton

St. Matthews P. E. Church, Francisville,
 Philadelphia, Pa. (five hundred) \$500.00
 Grenfell Mission, Labrador (two hundred
 & fifty) 250.00
 Home for Incurables, Washington, D. C.
 (one hundred) 100.00

Walsh Fulton

My body is to be cremated, and the ashes buried in
 my lot in Laurel Hill Cemetery, Philadelphia, Pa, and
 a plain granite stone with my name only—The
 11 casket must be very inexpensive, and nothing
 but a simple service.

Mary E. Graff

4913 Monument Road, Phila, Pa.
 is to be appointed executrix to
 serve without bond.
 If she should die before I do,
 Annie W. Chieves will be the
 executrix without bond.

Revoked by
 codicil of
 May 11, 1936
 Inez W. Fulton

Inez Walsh Fulton

After the death of Mary E. Graff, and Annie W.
 Chieves, the estate is to be placed in the City Trust of
 Philadelphia, Pa which has charge of the funds of
 Girard College;—to purchase a scholarship in the
 Medical School, Jefferson College, for a Protestant
 graduate of Girard College, at graduation, who has
 an excellent record during his entire period of resi-
 dence in Girard College, for character and scholarship.

The training in Jefferson College is to be in general
 medicine—as I feel there is needed good practitioners,
 not specialists.

No course in Jefferson College must be
 12 granted for longer than four years.

If the lad does not do good work, and have ex-
 cellent reports, he must be dropped, and the advantage
 given to another Girard College graduate.

This means that during vacation no \$30 is to be allowed.

During the Jefferson College *sessions, the student may be allowed \$30 a month, should the City Trust find that amount available;—less if not.

Should the estate in the future, allow enough for an additional student, the Board of City Trust is authorized to extend the benefaction at their discretion.

The scholarship is to be called “The Inez Walsh Fulton Scholarship”.

INEZ WALSH FULTON

July 3, 1933

addresses

(American Security & Trust Co.
Washington, D. C.

Witnesses

Robert B. Scott

Adam H. Gaddis

W. H. Kelley

Copy

13 Endorsed: Filed Dec 10 1940 Charles E.
 Stewart, Clerk

Exhibit B

Codicil to the will of Inez W. Fulton made and attested on July 3 - 1933—

Inez Walsh Fulton

This eleventh day of May 1936 I revoke the item in my will of July 3 - 1933 making my executor Mary E Graff

4913 Monument Road,

Philadelphia, Pa. and

in her place I appoint as executor.

The American Security & Trust Co.

15th & Penn Ave.

Washington, D. C.

Inez Walsh Fulton

INEZ W. FULTON

1657 - 31st

May 11 - 1936

Witness

George B. Williams, 1009 9th St. N. E.

W. H. Kelley 127

J. W. Lyon

14 Endorsed: Filed Dec 10 1940 Charles E. Stewart,
Clerk

Copy

Exhibit D

Be It Remembered, That I, Mary E. Graff, of the City of Philadelphia, widow, being of sound and disposing mind, memory and understanding, do make, publish and declare this, as and for my last Will and Testament, hereby revoking and making void all Wills by me at any time heretofore made, in manner and form following, that is to say:

First: I order and direct my Executor, hereinafter named, to pay all my just debts and funeral expenses as soon as conveniently may be done after my decease; And I direct that my body, after my decease, be interred in the lot of my husband, George J. Graff in the Belmont Section of the West Laurel Hill Cemetery.

Second: I give, devise and bequeath unto the Wynnefield United Presbyterian Church now located at Fifty-fourth Street below Wynnefield Avenue, Philadelphia, the sum of Five Hundred Dollars (\$500.00), absolutely.

Third: I give, devise and bequeath unto St. Matthews Protestant Episcopal Church, now located at Francisville, Philadelphia, the sum of One Thousand dollars (\$1,000.00), absolutely.

Fourth: I give, devise and bequeath unto Hubert A. Spangler, in appreciation of his many services to me, the sum of Ten Thousand Dollars (\$10,000.00), absolutely.

Fifth: I give, devise and bequeath unto Reverend Hugh Newlands, the sum of Two Hundred and fifty Dollars, (\$250.00) absolutely.

Sixth: I give, devise and bequeath unto Bessie Handley, my nurse, the sum of Five Hundred Dollars, (\$500.00), absolutely.

Seventh: I give, devise and bequeath to Irving H. Anderson, the sum of Two Hundred Dollars (\$200.00), absolutely if he is in my employ at the time of my death.

15 Eighth: I give, devise and bequeath unto Mabel Taylor, the sum of Fifty Dollars (\$50.00), absolutely, if she is my employ at the time of my death.

Ninth: All the rest, residue and remainder of my Estate, real, personal and mixed of whatsoever kind and wheresoever situate, I give, devise and bequeath unto my friend Hubert A. Spangler, In Trust nevertheless to invest the same in good legal securities in the judgment of my said Trustee and to pay unto my sister Anna W. Chieves for and during the term of her natural life, the sum of Two Hundred Dollars (\$200.00) on the first day of each and every month out of the income of my said residuary Estate and if the income should not be sufficient to meet such monthly payments then to pay the same out of the principal of my said residuary Estate so that my said sister shall be sure to receive the said monthly payment even though the entire amount of my residuary Estate should be distributed in meeting these monthly payments, and if my said sister should become so incapacitated as to require additional medical care and the services of a nurse, then I order and direct my said Trustee to pay for such expense in addition to the said monthly payments of Two Hundred Dollars (\$200.00) such amounts as may be necessary to defray such additional expense, and upon the death of my said sister Anna W. Chieves, I give, devise and bequeath my said residuary Estate or so much as thereof as remains, after paying the said amounts to my said sister, to Hubert A. Spangler, to him and his heirs absolutely forever.

Tenth: I direct that all the legacies, bequests, grants, and devises in this Will shall be paid free and clear of any collateral inheritance, succession, lineal, federal or other tax, which, if chargeable, shall be paid out of the corpus or *princiapl* of my residuary Estate.

quest, and in the presence of each other have subscribed our names as witnesses hereto:

(s) BESSIE HANDLEY

(s) H. H. SINNAMON

* * * * *

31 Endorsed: Filed Oct 22 1941 Charles E. Stewart,
 Clerk

*Answer of Clifton Maloney, Executor, Etc., Substituted
Defendant Number (1)*

Now comes Clifton Maloney, Executor of the estate of Annie W. Chieves, deceased, substituted under order of this court entered the 3rd day of October, 1941, for
32 defendant number (1), Annie W. Chieves, now deceased, and for answer to the bill of complaint, respectfully states:

1. He admits the allegations contained in paragraph 1 of said bill.

2. He admits the allegations contained in paragraph 2, so far as they relate to the decedent, Annie W. Chieves.

3. He admits the allegations in paragraph 3, excepting the computation of figures set out therein as \$26,470.80 which he is now advised is \$28,160.97, as shown in the Second Account of the plaintiff heretofore filed with this court.

4. He admits the allegations contained in paragraph 4.

5. He admits the allegations contained in paragraph 5.

6. Answering paragraph 6, defendant alleges that the gift to Annie W. Chieves and Mary E. Graff, now both deceased, was one of an absolute estate and as such this defendant as executor of the estate of Annie W. Chieves, deceased, is entitled to an one-half distribution of the net distributable assets of said estate plus any accrued and undistributed income.

Further answering said paragraph, this defendant takes no position concerning the action which should be taken by

plaintiff in connection with payment of legacies to defendant number (3) The Rector, Church Wardens and Vestrymen of St. Matthew's Church, Francisville; defendant number (4) The Grenfell Association of America, and defendant number (5) The Washington Home for Incurables; the said legacies being precatory in nature
 33 and is willing to abide the ruling of this court as to whether said legacies should or should not be paid.

7. He believes that the allegations of paragraph 7 are correctly stated.

8. He believes that the allegations contained in paragraph 8 are correct.

9. Further answering said bill of complaint, defendant alleges that under a proper interpretation and construction of the will of said decedent, this defendant, as executor aforesaid, is entitled to an equal one-half distribution of the net distributable assets of the estate of said decedent plus a like distribution of any accrued and undistributed income which may be in the hands of plaintiff as executor. Defendant further alleges that the language of the will,

"To my sisters, Mary E. Graff, 4913 Monument Road, North Wynnefield, Philadelphia, Pa, and Annie W. Chieves, 1657 - 31st Street, Washington, D. C., I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts." * * *

gives to the two sisters the entire estate in express and unequivocal terms and is so entirely devoid of ambiguity that it admits of no true construction other than the creation and conveyance of an absolute estate to them; and that the language used is exceptionally clear and succinct. Defendant further alleges that the gift over to defendant number (6) The Board of Directors of City Trusts of the City of Philadelphia referred to by the plaintiff is absolutely null and void.

Wherefore, this defendant having fully answered the bill of complaint respectfully prays:

1. That the will of said decedent be interpreted
34 and construed as passing an absolute estate to
Annie W. Chieves and Mary E. Graff, both now
deceased.

2. That said will insofar as it attempts to create a remainder or limitation over to defendant number (6) The Board of City Trusts of the City of Philadelphia be held absolutely null and void.

3. That any accrued and undistributed income in the hands of plaintiff as executor be equally divided between the estates of Annie W. Chieves and Mary E. Graff, both deceased.

4. That said will be construed as one passing an absolute estate to the first takers with the attempted remainder or limitation over, absolutely null and void.

5. And for such other and further relief as to the court may seem just and proper.

ROBERT F. COGSWELL

Hibbs Building

Washington, D. C.

*Attorney for Clifton Maloney,
executor, etc., substituted de-
fendant number (1)*

• • • • •

24 Endorsed: Filed Sep 5 1941 Charles E. Stewart,
Clerk

*Answer of Hubert A. Spangler to Complaint
For Construction of Will*

Now comes defendant number (2), Hubert A.
25 Spangler, individually and as executor and trustee
under the will of Mary E. Graff, deceased, and for
answer to the bill of complaint filed herein says:

1. Defendant admits the allegations contained in paragraph 1 of said bill.

2. Defendant admits the allegations set forth in paragraph 2 relating to himself as the duly qualified and acting executor and trustee under the will of Mary E. Graff, a deceased beneficiary under the will of Inez Walsh Fulton, and also individually in respect of his interest under the will of said Mary E. Graff. Except as aforesaid and that he is advised that Annie W. Chieves is now deceased, this defendant has no personal knowledge of other allegations set forth therein and therefore can neither admit nor deny them.

3. Defendant admits the allegations concerning the death of Inez Walsh Fulton and the issuance of Letters Testamentary to plaintiff and believes that the computation of figures set out in said paragraph subject to examination and approval by this court, is correctly stated.

4. Defendant admits the allegations contained in paragraph 4.

5. Defendant admits the allegations of paragraph 5.

6. Answering paragraph 6, defendant alleges that the gift to deceased sisters, Mary E. Graff and Annie W. Chieves, was one of an absolute estate and as such, this defendant as executor and trustee of the estate of Mary E. Graff, deceased, is entitled to an one-half distribution of the net distributable assets of said estate plus any
26 accrued and undistributed income.

Further answering said paragraph, this defendant takes no position concerning the action which should be taken by plaintiff in connection with payment of legacies to defendants number (3) The Rector, Church Wardens and Vestrymen of St. Matthew's Church, Francisville; number (4) The Grenfell Association of America, and number (5) The Washington Home for Incurables, and is willing to abide the ruling of this court as to whether said legacies should or should not be paid.

7. Defendant believes that the allegations of paragraph 7 are correctly stated.

8. Answering paragraph 8 this defendant is advised that Annie W. Chieves, late a resident of the District of Columbia, died therein on the ninth day of May, 1941, leaving a last will and testament which has been offered for probate in the Probate Division of this court. Defendant therefore believes that at such time as the nominated executor is appointed and qualifies he should be made a party defendant to this proceeding.

9. Further answering said bill of complaint defendant alleges that under a proper interpretation and construction of the will of said decedent this defendant is entitled to an equal one-half distribution of the net distributable assets of the estate of said decedent plus a like distribution of any accrued and undistributed income which may be in the hands of plaintiff as executor. Defendant further alleges that the language of the will gives to the two sisters the entire estate in express and unequivocal terms and is so clearly stated that it admits of no construction other than the creation and conveyance of an absolute
 27 estate to them. Defendant further alleges that the limitation over to defendant number (6) The Board of Directors of City Trusts of the City of Philadelphia, referred to by plaintiff, is absolutely null and void.

Wherefore, this defendant having fully answered the bill of complaint respectfully prays:

1. That the will of said decedent be interpreted and construed as passing an absolute estate to Mary E. Graff and Annie W. Chieves, both now deceased.

2. That said will so far as it attempts to create a remainder or limitation over to defendant number (6) The Board of City Trusts of the City of Philadelphia be held absolutely null and void.

3. That any accrued and undistributed income in the hands of plaintiff as executor be equally divided between

the estates of Mary E. Graff, deceased, and Annie W. Chieves, deceased.

4. That the said will be construed as one passing an absolute estate to the first takers with the attempted remainder or limitation over, absolutely null and void.

5. For such other and further relief as to the court may seem just and proper.

ROBERT F. COGSWELL

Hibbs Building

Washington, D. C.

*Attorney for defendant number
(2) Hubert A. Spangler, ex-
ecutor, and so forth.*

* * * * *

19 Endorsed: Filed Apr 4 1941 Charles E. Stewart,
Clerk

Answer of Defendant (6)

The Board of Directors of City Trusts of the
City of Philadelphia

* * * * *

20 *Answer to Complaint for Construction of Will*

Now comes defendant number (6) The Board of Directors of City Trusts of the City of Philadelphia, a corporation, and for answer to the Bill of Complaint filed in the above-entitled cause says:

1. This defendant admits the allegations set forth in paragraph 1 of the Bill of Complaint.

2. This defendant has no personal knowledge concerning the allegations set forth in paragraph 2 of the Bill of Complaint, except such as relate to itself, which are hereby admitted, and therefore can neither admit nor deny said remaining allegations.

3. This defendant has no personal knowledge concerning the allegations of paragraph 3 of the Bill of Complaint

except the allegation setting forth the death of Inez Walsh Fulton, and the leaving by her of a last will and testament, which is hereby admitted, and therefore is unable to admit or deny the remaining allegations.

4. This defendant has no personal knowledge of the allegations set forth in paragraph 4 of the Bill of Complaint, and therefore is unable to admit or deny said allegations.

21 5. This defendant admits the allegations of paragraph 5 of the Bill of Complaint.

6. This defendant, answering the allegations of paragraph 6 of the Bill of Complaint, says (a) that the plaintiff has no duty or authority to make payments of any kind to any of the parties named in the complaint as defendants (3), (4), and (5); (b) that the bequests to Mary E. Graff and Annie W. Chieves were life estates only to be enjoyed as tenants in common; (c) that the plaintiff has no duty or authority to make any payment to the defendant (2) Hubert A. Spangler, either individually or as executor and trustee under the will of Mary E. Graff; and (d) that the plaintiff should now pay over to this defendant one-half of the net distributable assets of the estate of Inez Walsh Fulton.

7. This defendant admits the allegations of paragraph 7 of the Bill of Complaint.

8. This defendant has no personal knowledge concerning the allegations of paragraph 8 of the Bill of Complaint, and therefore is unable to admit or deny said allegations.

9. This defendant, further answering the Bill of Complaint, avers that under a proper construction of the last will and testament of Inez Walsh Fulton, the plaintiff, as executor, may not make payment to St. Matthews P. E. Church, Francisville, or to Grenfell Mission, Labrador, or to The Washington Home for Incurables, or any of
22 them, of the amounts set opposite their names in said will or of any other amounts, inasmuch as under

the terms of said will, the making of said payments is not compulsory, no trust being created by the language employed.

10. This defendant, further answering the Bill of Complaint, avers that under a proper construction of the will, this defendant is entitled, upon the death of the two sisters mentioned in said will, to the entire estate, or upon the death of either, to one-half of the estate, and said estate may not, by the sisters or either of them, be disposed of by will or otherwise. The language of the will is to be construed as exhibiting the intention of the testatrix to bequeath a mere life estate with its usual legal incidents to the two sisters, with remainder over to this defendant to be by the latter expended as the representative of Girard College, where the testatrix had been a teacher for a long period of years.

Wherefore, having fully answered the Bill of Complaint, this defendant prays as follows:

1. That the will of Inez Walsh Fulton be construed and enforced in accordance with the interpretation thereof set forth in this answer.

2. That the will of Inez Walsh Fulton be construed as imposing no duty whatever upon the plaintiff, as executor, to make payment to St. Matthews P. E. Church, Francisville, or to Grenfell Mission, Labrador, or to The
23 Washington Home for Incurables, of the respective amounts set opposite their names in said will; and directing the plaintiff that he may not make any such payments.

3. That the will be construed as conferring only a life estate upon the sisters of the testatrix with the usual legal legal incidents of such an estate, viz., the right to the income thereof in equal shares.

4. That the will of Inez Walsh Fulton be construed as requiring that upon the death of the two sisters named in said will, the estate shall be paid over to this defendant.

5. That, it being alleged that one of the two sisters of the testatrix is now deceased, the plaintiff be instructed to make payment to this defendant of one-half of the net estate of the said Inez Walsh Fulton.

6. That the plaintiff be instructed to make no payment under the will of Inez Walsh Fulton to the defendant Hubert A. Spangler or to the estate of Mary E. Graff.

7. And for such other and further relief as the nature of the case may require and this Court may deem proper in the premises.

HARRY S. RIDGELY

THOMAS J. McFADDEN

Attorneys for defendant (6)

DONOVAN, LEISURE, NEWTON &
LOMBARD,

Of Counsel

* * * * *

35 Endorsed: Filed Mar 8 1943 Charles E. Stewart,
Clerk

Pretrial Proceedings

Statement of Nature of Case:

This is an action for construction of a will.

The two issues are briefly and definitely set forth in the averments of paragraph 6 of the complaint and need not be repeated.

In respect to the first issue, namely, whether the plaintiff under the will should make payments to defendants #3, 4 and 5, such defendants submit the matter to the judgment of the Court, only defendant #5 being actively represented by local counsel, namely, Mr. Harrington.

Counsel for defendants #1 and 2 take no position with respect to the first issue and leave the matter to the judgment of the Court. Defendant #6 opposes the payments involved in the first issue.

The second issue involves the principal dispute in this action, the estates of decedent's two sisters claiming an absolute estate and defendant #6 claiming that they took only a life estate.

Stipulations: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

It is agreed that the Answer of defendant #6 may be considered as amended as of this date so that it will show that defendant #6 claims that the plaintiff should pay over to defendant #6 all of the net distributable assets of the decedent.

Papers marked by the Pre-Trial Justice will be produced by the Executor at the trial of this action. Among these papers is a carbon copy of a letter dated July 10, 1940 to Mrs. Annie W. Chieves and signed by T. Stanley Holland. It is agreed that this carbon may be received in lieu of the original, subject to every other proper objection.

It is agreed that the letter dated July 16, 1940 addressed to T. S. Holland by Annie W. Chieves is in the handwriting of Annie W. Chieves and that the letter addressed to Mrs. Inez W. Fulton dated November 4, 1935 and purporting to be signed by Francis Shunk Brown is signed by the said Brown.

36 Letter initialed by the Pre-Trial Justice dated Oct. 3, 1939 addressed to Mr. Spangler and purporting to be signed by Annie W. Chieves is in the handwriting of Annie W. Chieves and signed by her.

Letter initialed by the Pre-Trial Justice addressed to Francis S. Brown without date and purporting to be signed by Inez W. Fulton is in the handwriting of Inez W. Fulton and is signed by her.

Mr. Cogswell will endeavor to obtain from defendant #2 the amount of the estate of Mary E. Graff, deceased, and will give this information to Mr. Mahar, if obtained.

DAVID A. PINE
Pretrial Justice.

Dated March 8, 1943.

Remarks of Pretrial Justice for consideration of Trial Justice:

Attorneys authorized to act:

STANTON C. PEELLE, JR.

Plaintiff.

ROBERT F. COGSWELL

RICHARD A. MAHAR

R. S. HARRINGTON

Defendants.

* * * * *

69 Endorsed: Filed May 4 1943 Charles E. Stewart,
Clerk

Findings of Facts and Conclusions of Law

Findings of Fact

The Court adopts the facts stated in the complaint and answers filed herein as findings of facts.

Conclusions of Law

The Court concludes as matters of law, as follows:

1. That the proper construction of the last will and testament and codicil thereto of the decedent, Inez W. Fulton, is to be determined from the provisions of the said will and codicil, and no extrinsic evidence is admissible to determine the construction or the extent of the bequests therein contained.

2. That the true intent and meaning of the aforesaid will and codicil with respect to the matters as to which the

judgment of the Court is sought in this proceeding, is as follows:

70 (a) That the entire estate of decedent, after payment of debts and funeral expenses, is bequeathed unconditionally and absolutely unto the two sisters of the decedent, Mary E. Graff and Annie W. Chieves, in equal shares.

(b) That the provisions contained in said will for the benefit of St. Matthew's P. E. Church, Francisville, Pennsylvania, the Grenfell Mission, Labrador, and the Home for Incurables, Washington, D. C., are expressions of a wish of the testatrix only and do not impose a charge in favor of said institutions.

(c) That the provisions contained in said will for the benefit of the City Trust of Philadelphia, Pennsylvania and Girard College or Jefferson College are expressions of a desire of the testatrix that her sisters should make provision therefor in their respective wills and do not impose any charge in favor of the said Trust or colleges; that in the alternative, the provisions for said Trust and colleges constitute an attempted limitation over of a remainder, following two vested and absolute estates in the sisters of the decedent, which is invalid and void.

DANIEL W. O'DONOGHUE
Justice

May 4th 1943

* * * * *

71 Endorsed: Filed May 4 1943 Charles E. Stewart,
Clerk

Judgment

This action came on to be heard at this term; and thereupon upon consideration thereof, it is this 4th day of May, 1943,

Adjudged, that the true intent and meaning of the last will and testament and codicil thereto of Inez W. Fulton,

deceased, with respect to certain matters as to which the judgment of the Court is sought in this proceeding, are as follows:

1. That the entire net residuary estate of said decedent is bequeathed, in equal shares, to Mary E. Graff and Annie W. Chieves (both now deceased).

2. That St. Matthew's P. E. Church, Francisville, Pennsylvania, Grenfell Mission, Labrador, Home for Incurables, Washington, D. C., and City Trust of Philadelphia, Pennsylvania, in behalf of Girard College or Jefferson College, are not entitled to receive any bequest under the last will and testament and codicil thereto of the
72 decedent aforesaid, and the plaintiff has no duty whatever in respect to any payments to said institutions or any of them.

DANIEL W. O'DONOGHUE
Justice

* * * * *

II.

EXCERPT FROM PROCEEDINGS.

58 The Court. I do not think it is necessary to cite any more authorities. Every court says that. The question is, How are you going to comply with the intent? That is what this court wants to find out. There is no doubt of the fact that the intent of the testatrix is
59 the cardinal rule. That is a very definite general rule. But how are we going to arrive at the intent in this case? I would like to hear cases along that line.

Mr. Mahar. By considering extrinsic evidence, such as this letter that I refer to, correspondence which I have called upon the executor to produce, correspondence between the American Security and Trust Company, the executor of Mrs. Chieves' estate while she was alive, in which she states what her sister wanted to do with the property.

I can produce another letter in which the attorney for the Graff estate put the same interpretation on this will that I am contending for here today.

The Court. Do you have any authorities that would authorize this court to take into consideration what a lawyer for an estate wrote as his opinion?

Mr. Mahar. Well, I think that an interpretation put on a will by anybody who was a beneficiary under the will is something to be considered by this court.

The Court. How about the cardinal rule of intent of the testator as gathered from the terms of the will itself?

Mr. Mahar. That will be found in the letters that she wrote, your Honor, in connection with the making of the codicil.

The Court. We will see about that. There is one letter; that is all.

Mr. Mahar. There is a letter from the president of the City Trusts answering one from her.

The Court. Is the letter which she wrote in existence?

Mr. Cogswell. I do not know whether it is or not. Do you have it, Mr. Mahar?

60 The Court. He said something about a letter of Mrs. Chieves.

Mr. Cogswell. I might say that it is my position that any letter or any extrinsic evidence is inadmissible and has not the slightest bearing on the question.

Mr. Mahar. Here is the letter, your Honor (handing a document to the court).

(The letters referred to are as follows:)

“1657 31st Street
Washington, D. C.

“Hon. Francis S. Brown,
President, Board of City Trusts.

“Dear Sir:

“During my years of teaching in Girard College, I became greatly interested in the lads.

"I have but two close relatives, and to them I will leave all the property owned, for their life use; after which I desire the estate be held in trust, for the specialized education of some worthy graduate.

"Will the Board of City Trusts accept the executorship of this small estate?

"I beg that this matter be strictly confidential.

"Very respectfully yours,

"(Mrs.) Inez W. Fulton
Formerly Inez E. Walsh."

61

"City of Philadelphia

Board of Directors of City Trusts

"Francis Shunk Brown
President

Lafayette Building
Philadelphia

"November 4, 1935

"Mrs. Inez W. Fulton,
1657 - 31st Street,
Washington, D. C.

"My dear Mrs. Fulton:

"I beg to acknowledge your letter without date, informing me of your desire to bequeath to two close relatives for life all of your property of which you may die seized, after which you 'desire the estate to be held in trust for the special education of some worthy graduate'. I feel sure the Board of Directors of City Trusts would accept the bequest, but your estate would have to be administered by some one other than the Board.

"With assurance of my regard, and appreciating your interest in the College, I remain

"Very truly yours,

"(s) FRANCIS SHUNK BROWN"

The Court. You may proceed.

Mr. Mahar. The case of *Smith v. Bell*, your Honor, also deals with the principle as to whether or not a fee may be reduced. I do not know whether your Honor wants me to argue along that line or not.

The Court. You may argue the case just as you wish. The only thing I suggested was that there was no use reading case after case showing the cardinal rule. The other side admits that. There is no controversy about
62 that at all.

Mr. Mahar. The case of *Smith v. Bell* I contend is on all fours with this case. The first part of the will said:

"I give to my wife, Elizabeth Goodwin, all my personal estate whatever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies * * * which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely."

Then thereafter he said:

"the remainder of said estate, after her death, to be for the use of the said Jesse Goodwin (his son)."

The question there is the same as the one here—May a fee estate be reduced to a life estate? And the court said that the latter clause qualified the former and made it only a life estate. And that was so even though the words were in there providing that she had a right to dispose of it absolutely.

The same question came up in *Stowell v. Hastings*, 59 Vermont, in which Mr. Justice Taft, when he was presiding in that court, stated:

"Even in those cases where an absolute estate is in terms given, if subsequent passages unequivocally show that the testator meant the legatee to take a life interest only, the prior gift is restricted accordingly."

I contend, your Honor, that the language of the testatrix used in this case shows a plain, definite, clear intent to only give her sisters a life interest in her property, and that she had always intended that the remainder of the estate should go to the establishment of a scholarship.

The Court. If that is so, what meaning are you
63 going to give to the word "unconditional"?

Mr. Mahar. The word "unconditional" means simply the quality of the estate. It was the quality and not the quantity. That is the case of *Kratz v. Kratz*, 189 Illinois, 276, 59 N. E. 519.

The Court. There is no question about the quantity of the estate. The question is, What was the nature of the estate? An unconditional gift, an unconditional devise, an unconditional bequest means what? One without any strings or any conditions tied to it whatsoever, does it not?

Have you finished?

Mr. Mahar. I believe I have, your Honor.

The Court. There is one interpretation of this will that might be possible to harmonize the whole will. Neither counsel has mentioned it, and it just occurs to the court.

Of course the court cannot take these letters and admit them in evidence if you object to them.

Mr. Cogswell. I object to them, your Honor.

The Court. The letter is from Girard College, along about November, 1935.

But taking the will itself, evidently written out by the woman herself in her own handwriting, and the codicil to it, likewise written out in her own handwriting—taking the will itself, the testatrix says, "I bequeath unconditionally all that I own and possess to my two sisters." And that covers the quantity of the estate. The estate is all personal property; is not that correct?

Mr. Mahar. Yes, your Honor.

64 The Court. That shows that the quantity of the estate was to be all she possessed—"all that I own

and possess.” The two sisters were to have the entire quantity of her estate without any conditions—no strings, no limitations, no qualifications attached to it. Then she adds, after she has done that, “asking them to make the following gifts.”

The court holds that without doubt that mere expression, “asking them to make the following gifts”, would not constitute those three pecuniary legacies as being legacies from the testatrix to those three beneficiaries, but it is merely a request that having given all that she owned and possessed to her two sisters, then if they will they may make those gifts to the three mentioned institutions. Having given her entire estate, unconditionally, to her two sisters and asking them to make the following gifts, could the will not be construed that she wanted them to make those gifts while they lived, and then that after their death she asked that the bequest be made to Girard College?

That is not altogether inconsistent, because that is a possible construction that could be put upon it to harmonize the will. But it was left to the two sisters to place this property in the City Trusts of Philadelphia. If they did not see fit to do it, the City Trusts of Philadelphia, Girard College and Jefferson College are in the same position as St. Matthews’ Church, the Grenfell Association of America, and the Home for Incurables.

That is a construction of the will which you may say is a little stretched, but that would account for everything that is in the will. That would seem to the court to harmonize everything in the will and give some meaning to it, but it would still be the actual estate, all
 65 that the testatrix left to go unconditionally and absolutely to the two sisters.

If that is not the construction to be put upon this will, then clearly there is a contradiction. The word “unconditionally” cannot be harmonized with the whole estate after the death of the two sisters, being left in trust and giving the two sisters only a life estate. There is no word

throughout this whole will that says, "I am leaving this property to my two sisters just for life." There is no word from which you can imply that expressly.

So the court holds that even if you put a construction upon it that the first construction I have stated is not the correct one, then you have got to say that the latter part of the will in regard to Girard College is in contradiction of the former part of the will, and that where an entire estate in fee simple is given to her sisters in the first part of the will, then you cannot restrict or limit or do away with that by anything in the subsequent part of the will.

This is not like some of the wills referred to by counsel. It does not talk about any residuary clause. It does not talk about what is to be done afterwards; but if you put the interpretation on it that she wants the following gifts made and she wants the following expenses paid, that is, asking the two sisters to provide that the rest of the estate go to these institutions, that is the interpretation the court puts upon this will, and I will sign an order to that effect.

I do not know whether you are going to make findings of fact or not, but that will be the opinion of the court, 66 that is the interpretation of the will. Even if that be not the correct interpretation, then the second interpretation of the will is that the unconditional bequests leave nothing for either of these specific gifts mentioned, including the scholarship gift. The scholarship gift is to be construed like the others. If it is not, it is in contradiction of the first part of the will.

Mr. Mahar. There was one thing I meant to mention at the beginning, and that is this. The files in this case show that Mrs. Chieves, one of the sisters, died. She took no position with respect to the will, although she did state her position to the executor of the estate in a letter in which she stated that she wanted the estate to go to her sister for the purpose of a scholarship. Despite that stand by Mrs. Chieves made while she was alive, we have the executor of her estate, who should be standing in her shoes here, speaking for her, taking the contrary position.

Mr. Cogswell. That is not correct, your Honor. It is true Mrs. Chieves wrote that letter. She also wrote other letters. But, without taking up the time of the court, that was all in a matter of compromise, and it wound up by filing a formal answer asking this court to construe the will.

The Court. This court cannot consider letters written by one of the sisters construing her will. I cannot even have an opinion from the letter of the testatrix herself, because a person cannot change a will by writing a letter.

Mr. Cogswell. Yes, your Honor. I think it is established that extrinsic evidence is not admissible.

The Court. Evidently she did want to change it
67 to the extent of changing her administrator or executor, but she did not do it.

Mr. Cogswell. Not only that, your Honor, but this letter which Mr. Mahar speaks of was written around 1940, and this will was executed in 1933.

The Court. No; I am talking about this letter of the testatrix that was written before November 4, 1935.

Mr. Mahar. But it explains the codicil. She must have felt she wanted someone to carry out the provisions of the will.

The Court. That letter cannot be taken as a codicil or change of a will, because it is not witnessed. She undertakes to say what she may have meant by the will, but the court cannot take such a letter as changing the will.

Mr. Mahar. No; I know that extrinsic evidence is not admissible to alter, change, or add to a will, but it is admissible, if your Honor please, to show the meaning that the testatrix attached to certain words to get the thought behind what she was trying to do in her will.

The Court. That is what is sometimes contended, but this court thinks you cannot do that. In other words, a person cannot execute a deed in fee simple and then write a letter and say, "I just intended to do so and so."

Mr. Cogswell. In the case of *Atkins v. Best*, 27 Appeals D. C., 148, it is stated in the syllabus:

“Where from the construction of the whole will it appears that a testatrix intended to dispose of her whole property; and where there is a devise to her mother of certain land without words of limitation, and a devise of other lands to her mother ‘during her life’,
68 the inference is strong that the devise of the first named property was intended to be in fee, and the will should be so construed.”

There are any number of cases, but this is one that I just picked up. The court said in that case:

“We are of the opinion that the extrinsic circumstances relied on in defendant’s answer, which consists of the recital of certain lands vested in her by the will of Abraham H. Best, of the transactions between her and Kate Best Atkins and husband concerning the sale of certain of these interests at her request and for their advantage, of the advance of money to the testatrix and of the submission of the draft of Kate Best Atkins’ will to defendant for her approval before its execution, cannot be considered as aids in the construction of the last-named will under which the defendant claims an estate in fee in the lands in controversy. Evidence of such extrinsic circumstances as the testator’s relation to persons, or the amount, character and conditions of his estate, is sometimes admissible to explain ambiguities of description in his will but never to determine the construction or the extent of the devises therein contained.”

That is the whole thing in a nut-shell, if your Honor please.

The Court. I will sign an order disposing of this case. Prepare it and submit it to the other side.

(Whereupon, at 11:35 o’clock a. m., the hearing in the above-entitled cause was concluded.)

BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

For the District of Columbia.

No. 8597

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY
OF PHILADELPHIA, A CORPORATION, *Appellant,*

vs.

CLIFTON MALONEY, As Executor under the Last Will of
Annie W. Chieves, Deceased, et al., *Appellees.*

**Appeal from the District Court of the United States
for the District of Columbia.**

ROBERT F. COGSWELL,
Attorney for Appellees.
Hibbs Building
723 15th Street, N. W.
Washington 5, D. C.

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IN THE

United States Court of Appeals

For the District of Columbia.

No. 8597

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE CITY
OF PHILADELPHIA, *Appellant*,

vs.

CLIFTON MALONEY, As Executor under the last will of
Annie W. Chieves, Deceased,
HUBERT A. SPANGLER, Individually and as Executor and
Trustee under the will of Mary E. Graff, Deceased.
THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF ST.
MATTHEW'S CHURCH, FRANCISVILLE, a Corporation.
THE GRENFELL ASSOCIATION OF AMERICA, a Corporation,
THE WASHINGTON HOME FOR INCURABLES, a Corporation,
AMERICAN SECURITY AND TRUST COMPANY, a body corporate,
Executor under the Will of Inez Walsh Fulton,
also known as Inez W. Fulton, Deceased,
Appellees.

BRIEF FOR APPELLEES.

This is an appeal by the Board of Directors of City Trusts of the City of Philadelphia from a judgment of the District Court of the United States for the District of Columbia entered May 4, 1943, in an action to construe

the will of Inez Walsh Fulton, also known as Inez W. Fulton, late a resident of the District of Columbia.

COUNTER STATEMENT OF CASE.

It was instituted by the American Security and Trust Company, Executor under the will of Inez Walsh Fulton against Annie W. Chieves, a sister of Inez Walsh Fulton upon whose death Clifton Maloney was duly appointed Executor and is substituted as a defendant; Hubert Spangler, individually and as Executor and Trustee under the will of Mary E. Graff, who was also a sister of Inez Walsh Fulton; the Rector, Church Wardens and Vestrymen of St. Matthew's Church, Francisville, named in the will as St. Matthew's P. E. Church, Francisville; the Grenfell Association of America, named in the will as Grenfell Mission; the Washington Home for Incurables; and the Board of Directors of City Trusts of the City of Philadelphia, named in the will as City Trust of Philadelphia. The appellees appearing in this court are Clifton Maloney, Executor under the last will of Annie W. Chieves, deceased, and Hubert Spangler, individually and as Executor and Trustee under the will of Mary E. Graff, deceased. All appendix references are to the Joint Appendix.

Inez Walsh Fulton died in the District of Columbia on June 12, 1939, (App. 4) leaving a last will dated July 3, 1933 (App. 9, Ex. A) and a codicil thereto dated May 11, 1936, (App. 11, Ex. B). Both were duly admitted to probate and record. The codicil made no change in the will other than to appoint The American Security & Trust Company as Executor.

QUESTION FOR DECISION.

The question presented to this Court is in narrow compass. Did the will of Inez Walsh Fulton convey the net estate to her two sisters unconditionally and absolutely or did it convey to them only a life estate with remainder over to the appellant?

Appellant in its brief, (p. 2) states that the only question presented, so far as the appellant was concerned, was "whether the will conveyed the net estate of the testatrix to her sisters absolutely or granted them life estates with remainder over to the appellant. The District Court held that the will gave the sisters an absolute estate in fee."

In its "Summary of Argument" (p. 4) appellant now bottoms its case on the ground that the will bequeathed to the two sisters "*life estates with power to consume the principal during their lives* and granted the remainder, consisting of the principal undisposed of at the deaths of the sisters to the appellant in trust * * ." Italics supplied.

RULE INVOLVED.

Rule 17. (i) POINTS NOT PRESENTED. Points not presented (errors not assigned in criminal cases from the district court) according to the rules of court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not presented or assigned.

APPEAL SHOULD BE DISMISSED.

Appellant has shifted its position and most of the cases cited in its brief are given to support the contention that where power is given to consume the principal the remainder over is good. In the trial court, however, appellant took the position that the will conveyed a life estate only "with the usual legal incidents of such an estate, viz, the right to the income thereof in equal shares." (App. 22)

Completely abandoning that ground it now goes so far as to say that "What Mrs. Fulton likely intended was nothing more than that during their lives the sisters would have the free and unrestricted use not only of the income but also of the principal with power to consume the same without incurring liability for waste." (Brief p. 10)

The record can be searched without finding even an approach to this theory in the trial court.

It is a rule almost without exception that:

A question of law which was not presented to nor passed upon by the trial court cannot be raised on appeal. 4 Fed. Dig. 226.

Issues or questions not raised in or presented to trial court will not be considered in reviewing court. 4 Fed. Dig. 227.

In support of this rule the following cases are cited:

An appellant is bound by the theory on which it presented its case in the trial court and courts of review will refuse to consider questions not raised and tried in the trial court. *New York Life Ins. Co. vs. Calhoun* 114 F. 2d 526, Cert. denied 61 S. Ct. 141, 311 U. S. 701, 85 L. Ed. 455.

A point never presented to the trial court cannot be raised for the first time on appeal. *Falstaff Brewing Corp'n vs. Iowa Fruit & Produce Co.*, 112 F. 2d 101.

An assignment of error which presents a question not submitted to the court below is not entitled to consideration. *U. S. ex rel. Laws vs. Davenport* 34 App. D. C. 502.

A question not raised or considered in court below cannot properly be made the subject of an assignment of error. *Cohen v. Cohen*, 47 App. D. C. 129.

We do not discuss petitioner's contention which he failed to assign as error below. *Sorzensky vs. U. S.* 300 U. S. 506-514.

No point arising on pleadings or evidence in appellate court may be made where it was not brought to notice of inferior court. *Brockett vs. Brockett*, 44 U. S. 691, 3 How. 691, 11 L. Ed. 786.

A question not raised at trial or reserved in bill of exceptions could not be raised in reviewing court. *Tome vs. Dubois*, 73 U. S. 548, 555, 6 Wall. 548, 18 L. Ed. 943.

Appellant having enlarged its point to such extent that the issue has been shifted from one ground or theory of law to another not presented to or passed upon by the trial court the appeal should be dismissed.

SUMMARY OF ARGUMENT.

The trial court did not err in holding that the entire estate after payment of debts and funeral expenses is bequeathed unconditionally and absolutely to the two sisters in equal shares; it did not err in holding that the provisions of said will for the benefit of the church and the two charitable institutions are expressions of a wish of the testatrix and do not impose a charge in favor thereof; it did not err in holding that the provisions of said will for the benefit of the City Trust of Philadelphia, Pa., and Girard College or Jefferson College are expressions of a desire of testatrix that her sisters should make provisions therefor in their respective wills and do not impose any charge in favor of the Trust or Colleges, and *that in the alternative*, said provisions constitute an attempted limitation over of a remainder, following two vested and absolute estates in the sisters of the decedent, which is invalid and void.

That the bequest conveyed to the two sisters an unconditional and absolute estate. That it is neither a life estate with power to consume the principal during the life time of the beneficiary, granting the remainder consisting of the principal undisposed of at death to the appellant, as is now alleged for the first time; nor is it only a life estate to the two sisters with the usual legal incidents thereof, *i. e.*, the right to income for life, with remainder over to appellant, the issue made by the pleadings and argument of counsel in the trial court.

ARGUMENT.

Preliminary.

For the first time, appellees are confronted with the contention that the will, instead of being construed to give the sisters only a life estate with the usual legal incidents of such an estate, *viz.*, the right to the income thereof in equal shares, should be construed to grant the sisters an estate for life with power to consume the principal dur-

ing their lives, with the remainder over to appellant. Appellant claims that the following cases support this theory.

Seaward v. Davis, 198 N. Y. 415, found on page 7 of appellant's brief is not in point because there was nothing said in the will to indicate that the first estate was in fee or unconditional. In fact, the language of the will indicated that it was not because testator said,

"Whatever personal estate *may remain at the decease of my wife*, I give and bequeath to Briel Davis and Abigail Davis, the parents of my wife, or if they are not living, then to my sisters aforesaid, and Lilly Corwin, share and share alike". Italics supplied.

The court said that it gave only a life estate to the wife, with absolute power of disposition during her lifetime; and considering the plain language of the will it is difficult to see how it could have done otherwise.

In the will of Inez Walsh Fulton she said:

"To my sisters Mary E. Graff . . . and Annie W. Chieves I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts."

And the *Matter of Ithaca Trust Company*, 220 N. Y. 437, found at page 8 of appellant's brief is not in point for the reason that in this case the testator said:

" * * in the event there is any of the property hereby willed to her left and undisposed of by her at the time of her death, * * *"

To the same effect and not in point is *In Re Byrne's Estate*, 181 Atl. 500, 320 Pa. 513. The will under construction provided:

"Sixth. All the rest, residue and remainder of my estate, whether real, personal or mixed, wheresoever situate, I give, devise and bequeath unto my beloved sister, R. Philomena Byrne, absolutely.

Seventh. Upon the death of my said sister, R. Philomena Byrne, should any part of my estate remain,

I give, devise and bequeath the same to my beloved niece, Mrs. J. M. Shadle."

The Court said:

"The sole question raised is whether Mrs. Byrne acquired absolute ownership of the residue of her sister's estate, or simply a life interest with power of consumption."

It was held that the sister received a life estate with power to consume the principal.

In so holding the court said:

"The cases of this character in our reports fall into two groups. On the one hand we have repeatedly observed that 'an estate devised in fee cannot by subsequent limitations be stripped of its legal incidents' (In re Fairman's Estate, 287 Pa. 334, 336, 135 A. 262, 263), and we have accordingly held that 'Where words sufficient to vest an absolute interest are used in a will, such interest is not to be cut down by subsequent provisions, unless the testator has indicated a clear intention to take away the estate previously given.' Cross vs. Miller, 290 Pa. 213, 216, 138 A. 822, 823. The matter was aptly put by Justice Kephart In Re Buechley's Estate, 283 Pa. 107, at page 109, 128 A. 730, 731: 'Where there is a gift of an entire estate by clear and explicit language, the presumption is that the gift is absolute, and subsequent clauses to reduce it must be equally clear and explicit, having the undoubted effect of causing such diminution.' " (P. 501).

And in the foot notes is to be found,

"* * * where testator's language reveals a controlling intention to give effect to the first taker an estate of absolute ownership, a gift of what remains over at the death of the first taker has been held to be void." Citing cases.

Also,

"Merely precatory words are, of course, likewise ineffective to cut down a previously given absolute estate." Citing cases.

The court in disposing of this case said:

“In vesting in Mrs. Byrne a life estate with power to consume, testatrix give her the complete use and enjoyment of absolute ownership except the power to control the devolution of the unconsumed portion upon her death. That testatrix should want to retain this power in order to benefit her ‘beloved niece’ who is thus described in no less affectionate terms than her sister, is natural.”

Analysis will show that the above cited cases are not in any way applicable to the facts in this case and the action of the trial court in ruling that the estate bequeathed to the sisters of Mrs. Fulton was an absolute one.

The case of *Smith vs. Bell*, 6 Peters 68, 31 U. S. 774, 8 L. Ed. 322, upon which appellant lays much stress, claiming it to be identical with the case at bar is readily distinguishable. The facts are far from being identical.

This case came up to the Supreme Court on a certificate of division from the Circuit Court of East Tennessee. It arose out of an action of trover by John Smith T., against Robert Bell for the recovery of the value of certain negro slaves named and described in the declaration. The defendant pleaded not guilty. The facts were agreed to and plaintiff moved for judgment of the agreed value of the negroes, if the court should be of the opinion that plaintiff was entitled to recover. Upon the case agreed, the following questions arose, upon which the court was divided. The question certified to the Supreme Court was:

“Whether, by the will of Britain B. Goodwin, Elizabeth Goodwin had an absolute title to the personal estate of Britain B. Goodwin, or only a life estate? And also whether Jesse Goodwin, the son of Britain B. Goodwin, by said will, had a vested remainder, that would come into possession on the death of said Elizabeth, or was the said remainder void?” (69)

The entire will of testator was written in one sentence, reading as follows:

“In the name of God, Amen! I Britain B. Goodwin, of the state of Tennessee, and the county of Roane, yeoman, being mindful of my mortality, do, this 17th day of October, in the year of our Lord 1810, and thirty-fifth year of independence of the United States of America, do make and publish this my last will and testament, in manner following: First, I desire to be decently buried in the place where I happen to die; also, I give and bequeath unto my son Jesse Goodwin, my young sorrel gelding and one feather bed, to be delivered to him by my executrix, after my decease; also, I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses; which personal estate, I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal, absolutely; the remainder of said estate, after her decease, to be for the use of said Jesse Goodwin; and I do hereby constitute and appoint my said wife, Elizabeth Goodwin, sole executrix of this my last will and testament. In witness whereof * * * .”

The opinion of the Court was written by Chief Justice Marshall and he stated the rule of law never deviated from in the construction of a will, “that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law.” Commenting on this rule it was said,

“In the will under consideration, but two persons are mentioned—a wife and a son. The testator attempts, in express words to make a provision for both, out of the same property. The provision for the wife is immediate, that for the son to take effect after her death. The words of the will make both provisions, but it is doubted, whether both can have effect. * * *

If the first bequest is to take effect, according to the obvious import of the words, taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same, as if the last member of the sentence were stricken out, yet both clauses are

equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. *We are no more at liberty to disregard the last member of the sentence than the first.* No rule is better settled, than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. *Either the last member of the sentence must be totally rejected, or it must influence the construction of the first, so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life.*" Italics supplied (p. 75-76).

From the foregoing it is apparent that there is no comparison to be made between the two wills. In that case the court was called upon to construe a single sentence containing the entire will. Obviously, as the court stated it could not take the sentence, break it into two parts, construe one and expunge the other. It had to be taken and considered together and indicated, therefore, a life estate only. Nothing comparable to this situation is to be found in the Fulton will.

Appellant cites *In Re Brennan's Estate*, 188 Atl. 160, 324 Pa. 410, as a case in point. This case like others cited to support the contention that one can bequeath a life estate only with power to consume the principal during the life of the life-tenant, with the remainder or unconsumed residue over, has no application to the instant case.

In the Brennan case testator made a number of specific bequests, and then provided:

"Ninth: All the rest, residue and remainder of my estate I give, devise and bequeath to my wife, Alice Brennan, with the right to sell and dispose of any of my real estate, with authority to make any and all deeds, conveyances and assurances, and execute the same, according to law, and holding the purchaser thereof free from any liability as to the application of the purchase money.

"Tenth: After the death of my wife, I give the remainder of my estate in equal shares to my sister-in-law, Bridget Sweeney, to my brothers, Richard Brennan and William P. Brennan, and my niece, Mary Ellen Griffen, to them and their heirs and assigns forever."

The Court said: "The question raised by this appeal is whether under the will the widow took the remainder of her husband's estate absolutely, or whether she acquired a life interest only with power to consume." (161) No such question is raised by the appeal to this court from the ruling of Justice O'Donoghue.

It then said, "In attempting to reconcile the apparently conflicting provisions of this will, our primary aim must be to ascertain and give full effect to the intention of the testator as it appears from the four corners of the will."

Referring to an earlier opinion of the court, the opinion states:

" * * Mr. Justice Drew writing the opinion of the court (In Re Byrne's Estate, supra) reviews at length the cases of this character, and divides them into two groups, viz: (1) Where the testator shows by clear and explicit language a controlling intention to give an absolute estate to the first taker, any attempt to cut down this absolute ownership by limitations over on the death of the first taker is ineffective, and (2) where the language of the whole will clearly indicates that testator intended the gift to be a life estate only with power to consume, with remainder over on the death of the first taker, it will be so construed, although the words of the gift, standing alone, would import absolute ownership in the first taker."

"Turning to the will before us, we are of the opinion that it falls within the second group of cases described in Byrne's Estate, supra, as it appears that testator intended to give his wife a life interest only in his estate, with power to consume the principal while she lived, and upon her death the remainder or uncon-

sumed residue of his estate was then to be paid over in equal shares to the designated beneficiaries." (p. 162)

Concluding its opinion, the court had this to say:

" * * It is evident that the testator knew how to make a gift of an absolute estate, for in the first paragraph he gave \$10,000 and all his household goods to his wife 'absolutely and forever', and likewise in the tenth paragraph he gave the remainder to relatives and added 'to them and their heirs and assigns forever'. The first, ninth and tenth paragraphs considered together show definitely, therefore, that testator meant to give his wife an estate for life only in his property."

It can not be seriously contended that the cases cited by appellant to support an issue not tried to the court below have any proper place in this proceeding. They are not applicable to the issue in this case as made by the appellant itself, viz, Prayer 3:

"That the will be construed as conferring only a life estate upon the sisters of the testatrix with the usual legal incidents of such an estate, viz., the right to the income thereof in equal shares. (App. 22) Italics supplied.

In paragraph 10 of its Answer appellant states:

"This defendant, further answering the Bill of Complaint, avers that under a proper construction of the will, this defendant is entitled, upon the death of the two sisters mentioned in said will, to the entire estate, or upon the death of either, to one-half of the estate, and said estate may not, by the sisters or either of them, be disposed of by will or otherwise. The language of the will is to be construed as exhibiting the intention of the testatrix to bequeath a mere life estate with its usual legal incidents to the two sisters, with remainder over * * *" (App. 22) Italics supplied.

ARGUMENT.

Appellant in its argument (p. 5) states that the court below in its oral opinion delivered at the conclusion of the argument of counsel, construed the portions of the will of the testatrix by which she established a trust for the benefit of Jefferson College students "as nothing more or less than a request by the testatrix to her sisters to place the undisposed portion of the property which she left them in trust for the benefit of Jefferson College".

This allegation is not in accordance with the facts because Mr. Justice O'Donoghue in his oral opinion (App. 31) placed alternative constructions on the question at issue and his conclusions of law (App. 26), paragraph (c) expressly state:

"That the provisions contained in said will for the benefit of the City Trust of Philadelphia, Pennsylvania and Girard College or Jefferson College are expressions of a desire of the testatrix that her sisters should make provision thereof in their respective wills and do not impose any charge in favor of the said Trust or colleges; *that in the alternative*, the provisions for said Trust and colleges constitute an attempted limitation over of a remainder, following two vested and absolute estates in the sisters of the decedent, which is invalid and void." Italics supplied.

Appellees do not dispute the statement of appellant that it has "long since been well settled that the intent of a testator is to be drawn from the four corners of the will and that this means that all portions of the will are of equal validity and are to be enforced unless it is impossible to give force to all of them."

This rule of law was not disputed below and is not disputed here. We likewise agree with appellant in its statement (p. 6) that: "In these cases the courts have frequently mentioned that, while certain rules of construction have been developed, it is dangerous to reason from the fact situation in one case to the fact situation in an-

other case unless the fact situations are identical". This court said in *Evans vs. Ockershausen*, 69 App. D. C. 285, 100 F. 2d, 695, 700, Cert. denied 306 U. S. 633, quoting Mr. Justice Groner: "'It has been aptly said that no will has a twin brother.'" "Precedents help but little in the construction of wills, because no will has a 'twin brother' and if a twin brother were found, he, most likely, would not be identic." (p. 702)

Again on page 6 appellant makes the statement:

"There are only two possible constructions of the will of the testatrix. Either she gave her entire estate to her sisters absolutely or she left her estate to them for life with remainder over of the undisposed portion in trust to establish the Inez Walsh Fulton Scholarship at Jefferson College. To adopt the first alternative is to reject the bulk of the will as not being testamentary in character. Only by adopting the second alternative can meaning be given to the whole of the will."

Appellees agree that there are only two possible constructions of the will. They deny the allegation that "to adopt the first alternative is to reject the bulk of the will as not being testamentary in character". The court below did not reject any part of the will, much less the "bulk of the will". On several occasions the trial court justice spoke of "harmonizing the will" (app. 31-32). The details of the proposed provision for the college have no bearing whatever on the question of intention of the testatrix; whether it was her intention to reduce the gift to a life estate or whether she simply requested her sisters to make such a gift to the Board of City Trusts for the college.

Appellees deny that it is true or correct to say that "only by adopting the second alternative can meaning be given the whole of the will". The interpretation by the court below that the gift after the death of the sisters was

only one of the gifts that testatrix asked them to make gives meaning to every part of the will:

“The court holds that without doubt the mere expression, ‘asking them to make the following gifts’, would not constitute those three pecuniary legacies as being legacies from the testatrix to those three beneficiaries, but it is merely a request that having given all that she owned and possessed to her two sisters, then if they will they may make those gifts to the three mentioned institutions. Having given her entire estate, unconditionally, to her two sisters and asking them to make the following gifts, could the will not be construed that she wanted them to make those gifts while she lived, and then that after their death she asked that the bequest be made to Girard College? That is not altogether inconsistent because that is a possible construction that could be put upon it to harmonize the will. But it was left to the two sisters to place this property in the City Trusts of Philadelphia. If they did not see fit to do it, the City Trusts of Philadelphia, Girard College and Jefferson College are in the same position as St. Matthews’ Church, the Grenfell Association of America, and the Home for Incurables.” (App. 32)

The two cases on which appellant lays great emphasis, seemingly contending that they are controlling here, and claiming that “of all the cases in the books, are closest on their facts to the instant case” and “are really identical” viz., *Smith v. Bell*, supra and *In Re Byrne’s Estate*, supra, in both of which cases the word “absolutely” was used, aptly illustrate the truth of appellants statement that “it is dangerous to reason from the fact situation in one case to the fact situation in another case unless the fact situations are identical.”

Mrs. Fulton’s will contained language not found in either of the wills interpreted in the above two cases. The will itself showed that the testatrix well understood the difference between a direct gift and a precatory provision. In Mrs. Fulton’s will she gives her estate “unconditionally” to her sisters.

The first paragraph of the will of said Inez Walsh Fulton (App. 9, 10, 11) reads:

“To my sisters, Mary E. Graff, 4913 Monument Road, North Wynnefield, Philadelphia, Pa., and Annie W. Chieves, 1657 31st Street, Washington, D. C., I bequeath, unconditionally, all that I own and possess, asking them to make the following gifts.”

Immediately following in separate sentences she lists:

“St. Matthews P. E. Church, Francisville, Philadelphia, Pa. (five hundred).....	\$500.00
Grenfell Mission, Labrador (two hundred & fifty)	250.00
Home for Incurables, Washington, D. C. (one hundred)	100.00”

She next states that her body is to be cremated; the ashes buried in Laurel Hill Cemetery; that there is to be a granite stone “with my name only”, that the casket “must be very inexpensive, and nothing but a simple service.”

Next she appoints her sister Mary E. Graff executrix without bond, stating that if she should die before I do, Annie W. Chieves will be the executrix without bond.

Then comes the clause:

“After the death of Mary E. Graff, and Annie W. Chieves, the estate is to be placed in the City Trust of Philadelphia, Pa. * * * to purchase a scholarship * * *.”

In the first clause of her will, in fact throughout the entire instrument testatrix said nothing whatever about the estate being given to her sisters for life. She said nothing whatever about whether they should receive the income for life only. What she did say was—“I give them, unconditionally, all that I own and possess, and ask them to make the following gifts.”

This introduces an element lacking in the wills considered in *Smith v. Bell*, *supra*, and *In Re Byrne's Estate*,

supra, relied on by appellant as controlling this case—viz., that the “following gifts” that her sisters were asked to make referred not only to the three gifts to the institutions but also to the final gift after the death of the sisters as indicated by the language used. She does not say that after the death of the sisters she gives her estate, or the remainder of her estate, to the Board of City Trusts, but says “the estate is to be placed”, indicating that this was one of the gifts that she requested but did not require that her sisters should make. Query, who else except her sisters by their wills could so place it? It is to be noted that no trustee was appointed; only an executrix whose functions would by law cease as soon as she had administered the estate and it had been awarded to the two sisters. There was no one else except the sisters who could cause the estate “to be placed”. Furthermore, only in a very remote contingency could both of her sisters die at the same time. Testatrix made no gift over to the survivor upon the death of one, nor any provision for then giving the deceased sister’s share to the Board of City Trusts. One sister predeceased the other by approximately two years. Where then, would the one-half share of the first deceased sister vest until the death of both, pending the death of the second sister? None of these difficulties are present if the will is construed, as it was by the trial court, that she simply requested her two sisters to make this provision to the Board of City Trusts.

Appellant, speaking of contradictory dispositions in connection with the application of the general rule of law that the intent of the testator is to be drawn from the four corners of the will, a rule universally recognized, cites *Atkins vs. Best*, 27 App. D. C. 148. There this court said:

“Where from the construction of the whole will it appears that a testatrix intended to dispose of her whole property; and where there is a devise to her

mother of certain land without words of limitation, and a devise of other lands to her mother 'during her life', the inference is strong that the devise of the first named property was intended to be in fee, and the will should be so construed."

And speaking of extrinsic circumstances as aids in the construction of wills, it said:

"Evidence of such extrinsic circumstances as the testator's relation to persons, or the amount, character and conditions of his estate, is sometimes admissible to explain ambiguities of description in his will but never to determine the construction or the extent of the devices therein contained."

Abbott vs. Essex Co., 18 How. 202, 15 L. Ed. 352, is cited. This case is not in point. It revolves about the construction to be given the phrase "heirs of his own".

In its opinion the court said:

"There is perhaps, no point of testamentary construction which has undergone such frequent discussion, and is so fruitful in cases not easily reconciled, as that now brought under our consideration. This has arisen, in a great measure, from the discrepancy between the popular acceptance of the phrases 'if he die without issue', 'in default of issue', and similar expressions, from the established legal acceptance of them in courts of justice. It is often necessary to construe these expressions as conveying an estate tail by implication, in order to carry out the evident general intent of the testator." (p. 212)

And to support its argument with reference to contradictory dispositions, appellant cites McCaffrey vs. Manogue, 22 App. D. C. 385, 196 U. S. 563, 25 S. C. Rep. 319. This case went up to the Supreme Court from the District of Columbia. Both the trial court and the Court of Appeals held that the will conveyed only a life estate. McCaffrey died and left a will which was admitted to probate and record in the District Supreme Court. He

made a number of bequests. To a daughter, Mary A. Quigley he provided: "I give and bequeath certain real estate, money in bank etc. * * * She is to pay funeral expenses and any other legal debts I may owe, also to care for my lot in Mount Olivet Cemetery." To three sons, a daughter and two grandsons he left legacies exactly the same as that to the daughter except that no charge was made against them. As stated, the case is not in point for the reason that both courts below applied the then rule of law that a devise of land without words of limitation or description conveys a life estate only. No real estate is involved in the Fulton will. The Supreme Court, reversing the lower courts held that Mary A. Quigley took an estate in fee simple and not a life estate.

The ruling of the trial court in this case that the two sisters took an estate in fee simple is amply sustained by a long line of decisions of this court, and the Supreme Court of the United States:

Commenting on the use of the word "unconditionally" Mr. Justice O'Donoghue said:

"* * * But taking the will itself, evidently written out by the woman herself in her own handwriting, and the codicil to it, likewise written out in her own handwriting—taking the will itself, the testatrix says, 'I bequeath unconditionally all that I own and possess to my two sisters.' And that covers the quantity of the estate. The estate is all personal property, ... That shows the quantity of the estate was to be all that she possessed—'all that I own and possess.' The two sisters were to have the entire quantity of her estate without any conditions—no strings, no limitations, no qualifications attached to it. Then she adds, after she has done that, 'asking them to make the following gifts.'

Websters International Dictionary defines "unconditional" as an adjective, and "unconditionally" as an adverb, as follows:

“Not conditional, limited, or conditioned; made without conditions; absolute, unreserved; as, an unconditional surrender.

O, pass not, Lord, an absolute decree
Or bind thy sentence unconditional.
Dryden.”

At page 13 of its brief, appellant contends, “Obviously, ‘unconditionally’ is no stronger in its legal effect than ‘absolutely’”, stating that, “in fact, ‘absolutely’ has the more definite legal meaning.” It is not necessary to argue that standing alone, the word “unconditionally” has any stronger legal significance than the word “absolutely” but when considered in connection with the added language in the same sentence, “asking them to make the following gifts,” the word has, we contend, a special significance, i.e., conveying the intention of testatrix that she was only *asking* her sisters “to make the following gifts”; not giving her estate to them on condition that they make the gifts. The word “unconditionally” set forth the kind of estate she wanted them to have—a fee simple.

In *Presbrey v. Simpson*, 53 App. D. C. 358, 290 F. 333, the court had before it for construction a will containing the clause, “I commit my body to dust from whence it came—my soul unto God who gave it—my property unto my wife. It held she took a fee simple estate. The court said:

“It is contended that the word ‘commit’ is insufficient to constitute an absolute gift of property and hence that the testator died intestate as to one-half the remainder of his estate. * * *

Our inquiry is, not what ‘commit’ may mean, but what, as used by the testator in this instrument, it was intended to mean.

The interpretation we have placed upon the word brings into harmony the various provisions of the will, and gives force and effect to the abiding and unconditional intention of the testator.”

“Unambiguous language in a will neither requires nor admits of construction according to technical rules.”

Evans v. Ockershausen, 69 App. D. C. 285, 100 Fed. 2d, 695, 703.

"Words in a will must be construed in the usual and ordinary sense in which they were intended to be used by the testator at the time of his death." Thompson, Construction of Wills, p. 126, Sec. 76.

"Words and expressions used in a will are to be construed naturally and to be taken in their ordinary, proper and common accentuation unless it clearly appears in the will that they are used in a different sense." Mayo v. Wheadon, 47 App. D. C. 138.

Regarding the phrase "asking them to make the following gifts," the lower court said:

"The court holds that without doubt that mere expression 'asking them to make the following gifts,' would not constitute those three pecuniary legacies as being legacies from the testatrix to those three beneficiaries, but it is merely a request that having given all that she owned and possessed to her two sisters, then if they will they make those gifts to the three mentioned institutions . . . could not the will be construed that she wanted them to make those gifts while they lived, and then that after their death she asked that the bequest be made to Girard College. That is not altogether inconsistent because that is a possible construction that could be placed upon it to harmonize the will. . . . If they did not see fit to do it, the City Trusts of Philadelphia, Girard College and Jefferson College are in the same position as St. Matthews' Church, the Grenfell Association of America, and the Home for Incurables. That is a construction of the will which you may say is a little stretched, but that would account for everything that is in the will. That would seem to the court to harmonize everything in the will and give some meaning to it but it would still be the actual estate, all that the testatrix left to go unconditionally and absolutely to the two sisters.

If that is not the construction to be put upon this will, then clearly there is a contradiction. The word 'unconditionally' cannot be harmonized with the whole

estate after the death of the two sisters, being left in trust and giving the two sisters only a life estate. There is no word throughout this whole will that says, 'I am leaving this property to my two sisters just for life.' There is no word from which you can imply that expressly. So the court holds that even if you put a construction upon it that the first construction I have stated is not the correct one, then you have got to say that the latter part of the will in regard to Girard College is in contradiction of the former part of the will, and that where an entire estate is given in fee simple to her sisters in the first part of the will, then you cannot restrict or limit or do away with that by anything in the subsequent part of the will. This is not like some of the wills referred to by counsel. It does not talk about any residuary clause. It does not talk about what is to be done afterwards; but if you put the interpretation on it that she wants the following gifts made and she wants the following expenses paid, that is, asking the two sisters to provide that the rest of the estate go to these institutions, that is the interpretations the court puts upon this will and I will sign an order to that effect.

... Even if that be not the correct interpretation, then the second interpretation of the will is that the unconditional bequests leave nothing for either of these specific gifts mentioned, including the scholarship gift. The scholarship gift is to be construed like the others. If it is not, it is in contradiction of the first part of the will."

In the case of *Rust v. Mary Butler Washington & Mary Wilton Earle Harrison*, 69 W. L. R. 1245, (1941) the lower court was called upon to construe the will of Lelia W. Harrison. She left surviving, as her sole and only heir at law, a daughter, Mary Butler Washington Harrison. At the time of death she owned real and personal property of the value of approximately \$14,000. The will, written in long-hand, and undated, was admitted to probate and record. The daughter claimed that the will gave her an estate in fee simple. The niece contended that the daughter took a life

estate with remainder over in fee to the niece. The third and fourth items of the will required construction. The third item was contradictory. Said items read as follows:

“Third: I bequeath all my property personal and real to my daughter Mary Butler Washington Harrison, in fee simple at the time of my death for the duration of her life.

Fourth: I desire Harry Lee Rust, Sr., to act as her trustee and in the event of his decease that trusteeship shall be vested in his son Harry Lee Rust, Jr. At the decease of the said Mary Butler Washington Harrison, my daughter, I devise my estate in fee simple to my niece, Mary Wilton Earle, under the exceptions herein named, per se all articles inherited by and having belonged to my later husband William Burr Harrison such as watch having belonged to Burr Harrison. . . .”

The court said:

“The third item is contradictory. But for the concluding words—‘for the duration of her life—it would clearly appear that all of the property of the testatrix, personal and real, was bequeathed and devised to the daughter in fee simple. Such an estate is the highest that can be given either by deed or will. The two provisions are contradictory and, in such case, *that provision which most clearly accords with the intention of the testatrix must prevail*. The primary purpose of construction is to ascertain the intention of the testatrix and this may be gathered from other parts of the will. 69 Corpus Juris Sect. 1157, p. 110. In this connection courts are governed by the presumption that the testatrix intended to dispose of her entire estate and not die intestate as to the whole or any part thereof. Therefore, any reasonable construction will be adopted to avoid intestacy. 69 Corpus Juris Sect. 1147, p. 911.

We may dismiss without further consideration the attempt to create a trust in the fourth item. The trustee is named but the will fails to clearly set forth the purpose or object of the trust and also fails to point out with certainty the subject matter of the property of the trust. Hence, that provision of the will is void. O’Brien

v. McCarthy, 52 App. D. C. 183, 51 Wash. Law Rep. 8.”
Italics supplied.

The court concluded:

“The court is of the opinion that the defendant daughter, Mary Butler Washington Harrison, takes an estate in fee simple of all property, real and personal, other than the articles enumerated as inherited by and having belonged to William Burr Harrison, the late husband of the testatrix, and in which the daughter takes a life estate.”

The views expressed by the trial court are completely upheld by the action of this court in the case of *Evans v. Ockershausen*, supra. The case is too recent to require extended comment. It arose over a dispute as to the construction of the will of Dr. Kolipinski concerning the right of Mrs. Ockershausen to the net income of the trust estate to the exclusion of her children until after her death, and as to her right to the principal of two trust funds.

This court said:

“This will must be interpreted so as to effectuate the true intent of the testator as expressed in the will. This is the primary and basic rule to which all others must yield. *Smith v. Bell*, 6 Pet. 68, 74; 31 U. S. 774, 8 L. Ed. 322. It is not to be construed by isolated expressions, but must be construed in its entirety. Further it is true that ‘In determining the intent of the testator, little aid is derived from a resort to formal rules or a consideration of judicial determinations in other cases apparently similar.’ ” *Baldwin v. National Savings & Trust Co.*, 65 App. D. C. 174, 176, 81 Fed. 901, 903.

And concerning the contradiction found by the trial court in the Fulton will it said:

“It is well established that when any interest or estate is created in a will or other instrument in clear and definite language, such interest or estate is not lessened or nullified except by the use of equally clear and definite terms.

'I hold it to be a rule that admits of no exception in the construction of written instruments, that where one interest is given, where one estate is conveyed,—where one benefit is bestowed in one part of an instrument by terms, clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman could entertain a doubt,—in order to reverse that opinion, to which the terms used of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; * * * it is not even sufficient that you should deal in probabilities, but you must show something in another part of that instrument, which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by tacitum or by dubium, or by possible, or even by probable, but that it must be taken away, and can only be taken away by *expressum et certum*.' " *Thornhill v. Hall*, 2 Cl. & F. 22, 8 Bligh N. S. 88, 5 Eng. Repr. 879; *Hawley v. Grand Rapids Trust Co.* 267 Mich. 232; 255 N. W. 196.

"The primary significance of words should ordinarily attach and does attach, unless it is manifest from the will itself that other definitions are intended. Weight and meaning must be given to every word used if they make any sense at all. None are to be deleted and none added, for men make their own wills, nor should we search out obscure or recondite possibilities in simple words. Falstaff's babbling of green fields has sometimes led meticulous critics to untenable conclusions." *Rady v. Staiars*, 160 Va. 373, 168 S. E. 452; *Wallace v. Wallace*, 168 Va. 216, 225, 190 S. E. 293. (p. 702.)

Appellant at page 14 of its brief, paraphrasing *Smith v. Bell*, *supra*, states that testatrix could now be asked,

"Where do you want your property to go, your sisters having died," and that "she would, undoubtedly, answer 'I made that very clear in my will. I want my property to be placed in trust for the education at Jefferson College of deserving graduates of Girard Col-

lege and I want that trust to be known as the Inez Walsh Fulton Scholarship.”

Still quoting from *Evans v. Ockershausen*, supra., we find:

“As the language in question is free from ambiguity, we are not permitted to construe it and thereby substitute an entirely different meaning from the language set forth in the will. *Travers v. Reinhardt*, 25 App. D. C. 567, affirmed 205 U. S. 423, 27 S. Ct. 563, L. Ed. 865; *Mayo v. Whedon*, 47 App. D. C. 138, *Rady v. Staiars*, supra, *Wallace v. Wallace*, supra. *It is not for us to determine that the testator would have written differently upon this point had his attention been called to the suggested change.* Justice Holmes in *Eaton v. Brown*, 193 U. S. 411, 413, 24 S. Ct. 487, 48 L. Ed. 730, used very apt language in respect of interpreting a will when he said:

‘There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testator would have said if her attention had been directed to a particular point for what she has said in fact.’ Italics supplied, (p. 706).

In *American Security & Trust Company v. Blair*, 63 App. D. C. 170, 70 F. 2d 774, this Court said:

“The law recognizes the right of the owner of property to dispose of it by will. Inasmuch as that instrument speaks when the voice of the testator is stilled by death, its provisions must be the guide of the court in determining the testator’s intent. Where the language of the will is unambiguous and no positive rule of law is violated, that intent ought to be given effect; and it will be assumed, in the absence of fraud or undue influence, that the disposition actually made by testator represented his intentions.”

Page on Wills (2nd Ed.) (p. 1371):

“In construing a will the court has no power to make a will for the testator or to attempt to improve upon

the will which testator actually made. The court cannot begin by inferring testator's intention, and then construe the will so as to give effect to this intention, however probable it may be, nor can it rewrite the will, in whole or in part, to conform to such presumed intention. If testator has omitted to provide for the state of affairs which actually exists, the court cannot make the assumption that testator would probably have had a given intention if he had thought of the state of facts which actually existed, and give effect to such probable intention."

"Where an interest is given or an estate devised in one clause of the will it cannot be cut down or taken away by raising a doubt from other clauses but only by express words or by clear and undoubted implication.

Where the absolute power of disposal is given in express and unequivocal terms or clearly and unmistakably implied to the first taker under the will, a remainder over is void. *Montgomery v. Brown*, 25 App. D. C. 490.

In *Sherman v. American Security & Trust Company*, 57 App. D. C. 273, 20 F. 2d, 446, this court ruled that doubt in favor of construing a will should be resolved in favor of testator's kindred. It is interesting to note that the facts in this case are somewhat analogous to those in the *Fulton* case in that a college claimed a remainder interest as against kindred of the testator. Albert E. Seip left a will devising and bequeathing all his property to the American Security and Trust Company as trustee, to manage * * * and to do everything requisite to carry into effect the provisions of the will. He left a widow, two daughters, one son and a grandson. After making appropriate provision for his wife, he left a nominal sum to one daughter Beatrice Catherine Loomis with the statement that she had been provided for out of his estate through her mother. There were provisions directing the payment of a certain percentage of the net income annually to one daughter, son and grandson. Upon the death of all the devisees or the daughter, son and grandson, it was pro-

vided that the trustee should convey, transfer and set over to the Lafayette College, Easton, Pa., all the remaining estate "for the education of deserving youth in the college in which I was for sometime a student. I sincerely hope that the income of this bequest will be used each year in assisting poor and deserving students, as well as furthering the highest and best interests of the college." This amounted to 17%. A dispute arose concerning the distribution of this percentage; whether it was income passing into the corpus each year for distribution to those claiming it or whether it was to be paid to the college. The court held that this percentage of income or the income payable to any one of the devisees after the death of such devisee was to become part of the corpus of the estate and not to be paid to or accumulated for the residuary legatee or ultimate distributee—the college.

In disposing of the case, the court said:

"It is unnecessary to dwell upon the elementary principles pertinent to the construction of wills, further than to suggest that, if the present case were sufficiently close to invade the realm of doubt, it would be the duty of the court to resolve the doubt in favor of the kindred of the testator rather than the college. This rule of construction is concisely stated in Schouler on Wills, (5th Ed.) Sec. 479, as follows: 'It may be safely laid down that, of two equally probable interpretations of a will, that shall be adopted which prefers the family and kindred of testator to utter strangers.' "

Thompson on Construction of Wills states the rule of construction as follows, Sec. 67, p. 109:

"In case of ambiguity in the will, the law favors such construction as will be advantageous to heirs at law and next of kin in preference to strangers, or persons not so closely related to testator."

Thompson states another rule of construction which appellant overlooks, that of favoring the first taker: At page 117 it is said:

“In case of doubt, the construction of a will should be in favor of the first taker rather than the second taker. This is because of the fact that the law looks with disfavor on a construction that will tie up property, and the presumption is that the first taker is the testator’s favorite.”

Certainly no question can be raised in the instant case as to whether the first takers were the testatrix’s favorites.

In *Vogt v. Vogt*, 26 App. D. C. 46, 51, this court said:

“It is a rule of law that estates shall vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary. And the rule is the same where the subject matter is personal property.”

Appellant brings to the attention of this court the fact, which appellees submit is not a matter of importance, that at the time of the death of testatrix, one of her sisters was 81 years of age and the other 79 years of age. It fails to state that the will was executed in 1933 at which time Mrs. Chieves was only seventy-three years of age and Mrs. Graff seventy-five.

Appellant concludes its case by asserting that by the terms of the will of testatrix she granted her sisters an estate for life with power to consume the principal during their lives and granted the remainder, consisting of the principal undisposed of at the deaths of the sisters, to the appellant in trust * * *.

In the court below it made no attempt to rely on this principle as controlling the construction of the will. However, the court’s attention is called to two leading cases in this jurisdiction on this point. *Montgomery v. Brown*, *supra*, and *Howard v. Carusi*, 109 U. S. 725, held that where the absolute power of disposal is given in express and unequivocal terms, or clearly and unmistakably implied, to the first taker under a will, a remainder over is void. The will of Henry P. Montgomery devised to Emma V. Montgomery, his wife, all his real estate during

her life, with power to mortgage should her circumstances become such as to justify it. Certain specific bequests were made, one of which was revoked by a codicil. There were two clauses of this will to be construed, as follows:

"I also bequeath to my wife, Emma V. Montgomery, my life insurance and all other property, not otherwise disposed of by this will. * . .

At the death of my wife, Emma V. Montgomery, all my property—real, personal and mixed—shall revert to my brother, Winfield Scott Montgomery, and his heirs forever."

In its opinion this court said:

"This state of facts present for consideration two questions:

The second question is the important one, and that is as to whether Emma V. Montgomery's interest in the insurance money was absolute, or only a life interest therein."

After carefully considering the two paragraphs of the will it said:

"The learned justice in the court below, in reviewing the facts of the case and law applicable thereto, said: "In the case of Howard v. Carusi, 109 U. S. 725, 27 L. Ed. 1089, 3 Sup. Ct. Rep. 515, involving a devise of real estate and bequest of personal property to the brother of the testator to be held, used, and enjoyed by him, his heirs, executors, administrators, and assigns forever, with the hope and trust, however, that he would not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that, at his death, the same, or so much thereof as he should not have disposed of by devise or sale, should descend to the testator's three nieces, it was held by the Supreme Court of the United States that, inasmuch as the absolute power of disposal was given in express and unequivocal terms, or clearly and unmistakably implied, to the first taker, the remainder over was void. Citing cases.

‘In the case at bar, the testator evidently intended that his widow should not be limited or embarrassed in any way in respect of this insurance money which he wished her to have. * * *

The clause of the will upon which the complainant relies—namely, ‘At the death of my wife, Emma V. Montgomery, all of my property— real, personal and mixed—shall revert to my brother, Winfield Scott Montgomery, and his heirs forever’—is in the nature simply of a residuary disposition. The clause was necessary in order to dispose of the fee to the real estate in which he had simply vested the widow with a life estate, but beyond this it is only to be treated as a general clause. The testator’s first wish was to see to it that his wife should be properly cared for, * * *.’

In the second case the will of Lewis Carusi provided that as to all his property after debts, funeral expenses, etc., were paid:

“I give, devise and bequeath the same to my brother, Samuel Carusi, to be held, used and enjoyed by him, his heirs, executors, administrators and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death, the same, or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale, shall descend to my three beloved * * * nieces, the daughters of my said brother Samuel Carusi, as follows, . . .”

The Supreme Court of the United States in construing this will said:

“This will gives, first, an estate in fee simple to Samuel Carusi; it contains second, the expression of a hope and trust that he will not unnecessarily diminish the estate; and, third, it gives to the nieces of the testator so much of his estate as Samuel Carusi shall not at his death have disposed of by sale or devise. We have, then, devised to Samuel Carusi an estate in fee simple, with an absolute power of disposition either by sale or devise

clearly and unmistakably implied. Therefore, according to the adjudged cases, the limitation over to the nieces of the testator is void.

The rule is well established that, although generally an estate may be devised to one in fee simple or fee tail, with a limitation over by way of executory devise, yet when the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over is void." (p. 730)

It is the contention of appellees that the two foregoing cases, aside from others cited, completely dispose of the appellant's argument that the Fulton will is one which granted a life estate only to the two sisters with power to consume the principal, with remainder over in trust to the college. Both of the foregoing wills conveyed real estate as well as personal property, with remainders over. In the Fulton will the entire estate is personal property, and was bequeathed "unconditionally." Nothing whatever is said about remainder.

CONCLUSION.

The trial court carefully considered and construed the will as a whole; it found that the one primary definite intention as shown by the language in the will was to give the two sisters an absolute and unconditional estate; it found that the provisions in the will for the benefit of St. Matthews P. E. Church, Francisville, Pennsylvania, the Grenfell Mission, Labrador and the Home for Incurables, Washington, D. C., are expressions of a wish of the testatrix and do not impose a charge in favor of said institutions; it found that the provisions contained in the will for the benefit of the City Trust of Philadelphia, etc. are expressions of a desire of the testatrix that her sisters should make provision therefor in their respective wills and do not impose any charge in favor of the said trust or college; and that in the alternative, the provisions for said trust and colleges constitute an attempted limitation over of a

remainder, following two vested and absolute estates in the sisters of the decedent, which is invalid and void.

It is the position of appellees that the cases they rely upon and the rules of law therein laid down for the construction of wills in this jurisdiction establish that the trial court was correct in every particular in its construction of the will of decedent, and that its judgment should be affirmed.

Respectfully submitted,

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Spangler, Individually, etc.,
Appellees.*

REPLY BRIEF FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8597

THE BOARD OF DIRECTORS OF CITY TRUSTS OF
THE CITY OF PHILADELPHIA, A CORPORA-
TION, *Appellant*

vs.

CLIFTON MALONEY, as Executor under the last will
of Annie W. Chieves, Deceased, et al., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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Joseph W. Stewart

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IN THE
United States Court of Appeals

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Appeal No. 8597

THE BOARD OF DIRECTORS OF CITY TRUSTS OF
THE CITY OF PHILADELPHIA, *Appellant*,

vs.

CLIFTON MALONEY, as Executor under the last will
of Annie W. Chieves, Deceased,

HUBERT A. SPANGLER, individually and as Executor
and Trustee under the will of Mary E. Graff, Deceased,

THE RECTOR, CHURCH WARDENS AND VESTRY-
MEN OF ST. MATTHEW'S CHURCH, FRANCIS-
VILLE, a corporation,

THE GRENFELL ASSOCIATION OF AMERICA, a
corporation,

THE WASHINGTON HOME FOR INCURABLES, a cor-
poration,

AMERICAN SECURITY AND TRUST COMPANY, a
body corporate, executor under the will of Inez Walsh
Fulton, also known as Inez W. Fulton, Deceased,

Appellees.

REPLY BRIEF FOR APPELLANT.

QUESTIONS PRESENTED.

This reply brief will deal with appellees' contention that the appeal should be dismissed, and will discuss the cases on which they rely for affirmance.

Point I.

The Appeal Should Not Be Dismissed.

Appellees charge that appellant has changed its position in that it now maintains that the will should be construed to give the two sisters life estates with power to consume, whereas in the lower court it contended that the will gave the sisters life estates with the usual legal incidents which attach thereto, i.e., the right to the income thereof in equal shares. (Appellees' Brief, p. 3.) It follows, appellees argue, that the appeal should therefore be dismissed.

This contention may be disposed of summarily. Appellees themselves state:

“The question presented to this court is in narrow compass. Did the will of Inez Walsh Fulton convey the net estate to her two sisters unconditionally and absolutely or did it convey to them only a life estate with remainder over to the appellant?” (Appellees' Brief, p. 2.)

The only issue in this case, the only issue passed upon by the trial court, and the only issue to be passed upon here, as appellees themselves state, is and always has been whether the will gave the sisters life estates or estates in fee. The nature and extent of the incidents attaching to such life estates, if that is all the sisters received, have never been in issue.

The cases cited by appellees all involved situations where appellants urged for the first time on appeal issues not presented to the court below. To discuss these cases in detail would unduly burden the court, as appellant here urges no new issue. In fact appellant in the lower court relied on *Smith v. Bell*, 31 U. S. 68, one of the leading authorities on which it relies here, and in which the court construed the will as creating a life estate with power to consume.

Point II.

The Will Gave Appellant a Remainder in Trust.

Appellees have not cited one case in point. *Evans v. Ockershausen*, 69 App. D. C. 285, 100 F. (2d) 695 (1938), cert. den. 306 U. S. 633 (1938), (Appellees' Brief, pp. 14, 24-26) holds that, where a trust is created for the benefit of the settlor's wife during her life and the lives of their children, the wife alone is entitled to the income during her life. *Presbrey v. Simpson*, 53 App. D. C. 358, 290 Fed. 333 (1923), (Appellees' Brief p. 20) holds that the intent of the testator is the controlling factor, and that the word "commit" may convey a fee if it is so intended. *American Security & Trust Co. v. Blair*, 63 App. D. C. 170, 70 F. (2d) 774 (1934), (Appellees' Brief, p. 26) holds that the intent of the testator must be gathered from the will in the absence of ambiguity. *Vogt v. Vogt*, 26 App. D. C. 46 (1905), (Appellees' Brief, p. 29) holds that the law favors an early vesting of estates. *Sherman v. American Security & Trust Co.*, 27 App. D. C. 273, 20 F. (2d) 446. (Appellees' Brief, p. 27), holds that in a case of extreme doubt, the law favors the members of a testator's family. These cases, though sound in their holdings, simply do not meet or even relate to the issue presented here.

In *Rust v. Harrison*, 69 W. L. R. 1245 (1941), (Appellees' Brief, pp. 22-24) the court, applying the rule of *ejusdem generis*, interpreted an ambiguous provision of a will as a grant of a remainder to the testatrix's niece in personal property of a particular class, and held that the testatrix' daughter received a fee in all the other property.

Incidentally, the court in that case did exactly what appellees contend this court cannot do, since it cut down what would otherwise have been a fee to the daughter in the particular class of personal property and limited her to a life estate therein with remainder to the niece.

In *Montgomery v. Brown*, 25 App. D. C. 490 (1905) (Appellees' Brief, pp. 29-31), the testator devised all his real estate to his wife for life, with power to mortgage should

her circumstances become such as to justify it. After providing for several legacies, the will continued:

"I also bequeath to my wife, Emma V. Montgomery, my life insurance and all other property, not otherwise disposed of by this will . . .

"At the death of my wife, Emma V. Montgomery, all my property—real, personal and mixed—shall revert to my brother, Winfield Scott Montgomery, and his heirs forever."

At the wife's death, the testator's brother sued for the proceeds of the life insurance still remaining. The court held that the reversion granted the brother did not include any interest in the life insurance. It construed the words "real, personal and mixed", used by the testator in his provision for his brother as indicating the testator's intent to grant the brother a remainder in the real estate and in the undisposed of proceeds of any mortgage the wife might place on the real property.

Here again the court cut down an otherwise absolute interest, since it gave the brother a remainder in the proceeds of any mortgage money existing at the death of the life tenant, although the life tenant enjoyed a complete power of invasion.

In *Howard v. Carusi*, 109 U. S. 725 (1883) (Appellees' Brief, pp. 29-32) the testator gave all his property to his brother "to be held, used, and enjoyed by him, his heirs, executors, administrators, and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death, the same, or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale, shall descend to my three beloved nieces . . ."

The court held that the brother took a fee since he had been expressly given the absolute power of disposition by sale or device and thus there was nothing to which the attempted remainder could attach.

The case is not authority for the situation here. Mrs. Fulton did not give her sisters an express power of devise. In the Carusi case, the most precatory words possible were used in direct connection with the power to devise. That, too, is not the situation here.

As stated in our main brief (pp. 10-14) the instant case is on all fours with *Smith v. Bell*, 31 U. S. 68 and *In re Byrne's Estate*, 181 Atl. 500, 320 Pa. 513. The rules of construction for which appellant here contends were clearly stated by the court in *Montgomery v. Brown*, 25 D. C. App. Cas. 490, relied on by the appellees, at p. 494:

"There can be no question but that, notwithstanding the terms in one clause of a will denote an absolute estate, by a subsequent clause such an interest may be qualified by a limitation over in a certain event, or that it may be cut down; but as the New York court of appeals, in *Freeman v. Coit*, 96 N. Y. 63, in recognizing such rule said: 'There is another rule of construction of equal force, and not inconsistent with the one just stated, and that is that when an interest is given or an estate conveyed in one clause of an instrument, it cannot be cut down or taken away by raising a doubt from other clauses, but only by express words or by clear and undoubted implication,'—citing *Thornhill v. Hall*, 2 Clark & F. 22, and *Roseboom v. Roseboom*, 81 N. Y. 356."

Thus the question here is whether Mrs. Fulton by her provision for a remainder was only "raising a doubt" as to the estate granted her sisters or was cutting down that estate "by express words or by clear and undoubted implication."

Mrs. Fulton used one kind of language when she intended a provision to be precatory and another when she intended a provision to be absolute. In connection with the three precatory bequests, she used the words "... asking them to make the following gifts". (App. p. 9.) With respect, however, to the provisions for her cremation and burial, she used the words "is to be", words of direction and not

words of request, and precisely the same words she used in connection with the remainder. (App. p. 10.)

It would be manifestly absurd to hold that, because the provisions for the cremation of her body, for her burial, etc. follow the words ". . . asking them to make the following gifts" they are, therefore, precatory. Yet the lower court, in its admittedly "stretched" (App. p. 32) construction felt that the precatory language applied to the remainder provisions which follow the cremation and burial provisions. If the remainder is qualified by the precatory words, *a fortiori* are the cremation and burial provisions so qualified.

The only sensible interpretation that can be placed on this will is to limit the precatory words to the three charities to which the testatrix limited them. By so doing we are left with the grant to the sisters, which, standing alone, would give them an absolute estate, and with the remainder provision which, standing alone, would grant the appellants an absolute remainder. The words used by the testatrix in connection with this remainder are not precatory or equivocal. They do more than merely raise a doubt. Their clear effect is to cut down the prior grant not merely "by clear and undoubted implication" but "by express words". This is the only construction which gives full effect to the whole will.

Respectfully submitted,

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